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IN THE

Supreme Court of the United States.

JOHN D. HOOKER and A. E. POMEROY,
Plaintiffs in Error,
vs.
THE CITY OF LOS ANGELES.

No. 149.

BRIEF FOR THE CITY OF LOS ANGELES, DEFENDANT IN ERROR.

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IN THE

Supreme Court of the United States.

JOHN D. HOOKER and A. E. POMEROY, Plaintiffs in Error, vs. THE CITY OF LOS ANGELES.	No. 149.

BRIEF FOR THE CITY OF LOS ANGELES, DEFENDANT IN ERROR.

Statement of the Case.

This is a writ of error to the Supreme Court of the State of California to review a judgment of that Court, in favor of the City of Los Angeles, entered on the 3d day of June, 1899, affirming a judgment of the Superior Court of the County of Los Angeles, entered on the 2d day of April, 1896, and also affirming an order of the Superior Court, denying a new trial, entered on the 25th day of March, 1897.

THE JUDGMENT of the Supreme Court of California is at page 783 of the Transcript of the Record; the judgment of the Superior Court is at pages 60-2, and the order denying the new trial is at pages 686-7.

THE WRIT OF ERROR was allowed by the Chief Justice of the Supreme Court of California on June 24, 1901 (Tr., pages 805, 820).

THE ASSIGNMENT OF ERRORS was filed with the Clerk of the State Supreme Court on June 27, 1901 (Tr., pages 805–819).

THE WRIT OF ERROR was issued June 27, 1901, by the Clerk of the Circuit Court for the Northern District of California, and was filed with the Clerk of the Supreme Court of the State on the same date (Tr., pages 1, 2).

THE JUDGMENT of the trial Court was rendered in a suit brought by the defendant in error against plaintiffs in error to condemn a tract of land, composed of two contiguous parcels, for the purpose of being used by the City of Los Angeles as a site for headworks to divert water from the Los Angeles River for the supply of the said city and its inhabitants with water (Tr., pp. 32–8).

The original complaint was filed on June 3, 1893, and the summons was issued on the 27th of the same month, and was served June 8, 1894 (Tr., pp. 23–7).

A demurrer to this complaint was filed on June 18, 1894, and was sustained on July 23, 1894 (Tr., pp. 27–9).

A motion was made by the defendants in the Court below to dismiss the suit, but was denied July 23, 1894 (Tr., p. 32).

The complaint was again amended on August 1st, 1894, by interlineation and erasure (Tr., p. 32).

No action was had on the complaint as thus

amended, but on October 11, 1895, an amended complaint was filed (Tr., pp. 32–8).

A demurrer was interposed to this amended complaint on October 22, 1895, which was overruled November 4, 1895 (Tr., pp. 38–9).

On December 31, 1895, an answer to the amended complaint was filed, and on February 28, 1896, the complaint was allowed to be amended by interlineation, and a demurrer to the complaint as thus amended was filed on March 24, 1896, and was overruled March 26, 1896 (Tr., pp. 39–47).

On March 5, 1896, the answer had been amended by amendments filed on that date (Tr., pp. 47–9).

On February 19, 1896, the defendants in the Court below gave notice of a motion to stay all proceedings in the case, which motion was denied by the Court on February 25, 1896 (Tr., pp. 49–55).

THE TRIAL of the suit was commenced on February 28, 1896, and, by stipulation, all questions, except the amount of compensation to be awarded to the defendants, was tried before the Court, and, as soon as the trial was concluded, a jury was empaneled to pass on the issue concerning the amount of compensation.

A VERDICT was rendered by the jury, under instructions from the trial Court, on April 1, 1896, awarding $23,000 as the value of the land taken and $2,000 as the damages to the remaining portion of the tract of which that land formed part (Tr., pages 308–58).

The Court also filed findings on April 2, 1896, passing upon all of the issues except that of compensation (Tr., pages 58–60).

Judgment was rendered for the amount awarded by

the jury, and, also for defendants Pomeroy and Hooker's costs and disbursements (Tr., pages 60–2).

The defendants in the Court below (Pomeroy and Hooker) *appealed* from the judgment on May 29, 1896 (Tr., pages 69, 70).

A bill of exceptions on this appeal was allowed March 25, 1897, it being stipulated that a statement on motion for new trial, allowed on the same date, should be treated as part of the bill (Tr., page 307).

The defendants in the Court below, also in due time (which was ten days from the rendition of the verdict, according to the Code of Civil Procedure of California), gave notice of their intention to move for a new trial, and a statement, to be used on such motion, was allowed March 25, 1897 (Tr., pages 671, 682).

The defendants in the Court below *appealed* from the order denying their motion for a new trial on March 27, 1897 (Tr., page 687).

BOTH OF SAID APPEALS of Pomeroy and Hooker were, in accordance with the State practice, heard on one transcript at the same time, and the Supreme Court, in banc, affirmed both the judgment and the order denying the new trial on June 3, 1899, five of the Justices concurring in the opinion of affirmance, the Chief Justice dissenting on certain points and one of the Justices not participating (Tr., page 783).

A *petition for rehearing* was filed on behalf of defendants in the Court below on June 20, 1899, and the rehearing was denied by the Court in banc on July 3rd, 1899, without any dissent on the part of the Chief Justice (Tr., pages 725–783).

On June 24, 1901, a PETITION FOR A WRIT OF ERROR was presented to the Chief Justice of California, who allowed it on that date, but the petition was not filed

with the clerk of the Superior Court until June 27, 1901 (Tr., pages 783–805). A separate order was also made by the Chief Justice on June 24, 1901, allowing the writ of error and fixing the amount of the bond, and this order was filed with the Clerk of the Supreme Court on June 27, 1901 (Tr., pages 819, 820).

On June 27, 1901, a certificate, without date, of the Chief Justice was filed with the Clerk of the Supreme Court, stating the facts concerning the filing of the petition for rehearing and the making of the order denying the same, and also that the rules of the Court provided that where cases were determined in banc without having been allotted to a department of the Court, a petition for rehearing could be filed within 20 days after the decision, and that the case in question had not been allotted to a Court in department but had been decided by the Court in banc (Tr., pages 820-1).

An ASSIGNMENT OF ERRORS was filed with the Clerk of the Supreme Court on June 27, 1901 (Tr., pages 805–819).

THE LAND—ITS SITUATION AND VALUE.

It appeared from the evidence that THE TRACT OF LAND SOUGHT TO BE CONDEMNED was situated a few miles above and to the north of the City of Los Angeles, and that the surface stream of the Los Angeles River passed through the tract for its whole length, a distance of about two miles (see map, "Defendant's Exhibit F").

The land contained 314.82 acres, and formed part of a larger tract called the "Providencia Park Tract,'

which contained about 1,400 acres, and belonged to the same owners.

See Same Map.

At the trial, the defendants in the Court below, while resisting the right of the city to condemn the property in any event, made three contentions with regard to the elements of value which their land possessed; the *first* being that it was entitled to water for irrigation and other purposes by reason of being riparian to the Los Angeles River; *second*, that all of the water beneath the surface of the ground was percolating and did not form a stream, and therefore belonged to the owners of the land as part of the soil; and, *third*, that there was an unutilized water power, resulting from the fall in the surface stream of the river between the upper and lower boundaries of their land.

Witnesses on behalf of defendants in the Court below, placed different values on the land, ranging from $20,000 to $35,000, it not appearing whether such values were given on the basis of the land being irrigable or not (Tr., *page 223*).

The witnesses, on behalf of the city, gave the value of the property at from $5,000 to $15,000 (Tr., *page 283*).

Engineers, as expert witnesses, gave testimony on behalf of defendants to the effect that, in their opinion, there was at least some 19,000 inches of underground water flowing through the neck of the valley in which the land sought to be condemned lies, of which at least one-half to two-thirds passed through that land, and that 2,000 to 3,000 inches of water, measured under a four-inch pressure, constant flow, could be developed on the *locus in quo*, and other witnesses testified that

such water, when developed would be worth from $500 to $2,000 per inch (Tr., *pages 207, 296, 315, 323).*

This valuation of the developed water was not contradicted by the city, but other engineers, on its behalf, testified that the total amount of underground water, in their opinion, passing through the neck of the valley did not exceed 2,100 to 2,700 inches; and they also gave their opinion that none of it could be taken away without affecting the flow of the river (Tr., *pages 229, 233-4, 270-1, 548-550, 572-3, 586-8).*

Instructions to Jury.

Evidence was also given on behalf of the city concerning its rights to the use of the waters of the Los Angeles River; and at the conclusion of the testimony the Court instructed the jury that the city had the paramount right to use all of those waters, and that the defendants had riparian rights to use water from the same stream for the purposes of irrigation and domestic use, and also to utilize any water power which could be created, but subject to the paramount right of the city to use all the water needed for its inhabitants and for municipal purposes (Tr., pp. 643–4.)

The Court also instructed the jury that the right of the city to use the water was co-extensive with its present boundaries, which had been extended so as to include a considerable area above that which was embraced in the pueblo lands, which had been confirmed and patented to the city as successor of the former Pueblo of Los Angeles (Tr., p. 643.)

The claim to compensation with regard to the water power was abandoned after the trial, and no reference was made thereto in the specifications of insufficiency

of the evidence, nor was the same raised in the State Supreme Court or referred to in the opinion of that Court.

Assignments of Error and Alleged Federal Questions.

The plaintiffs in error assigned as error in the judgment of the Supreme Court of California various rulings, but the only ones which can be considered as suggesting a Federal question are those contained in Numbers 7, 14, 15, 17, 18, 19, 20, 24, 25 and 26 (Tr., pp. 807-819).

No suggestion was made in any of the pleadings or other proceedings in either the trial Court or the Supreme Court that any statute of California was in conflict with the Constitution of the United States, or that any right was claimed by plaintiffs in error under the Constitution or any Statute or Treaty of the United States, except that they set up in their answer that they derived title to their land through three Mexican grants which had been made by the Spanish or Mexican Governments and confirmed by the Land Commission under the Act of Congress of March 3, 1851, and which had been patented to their predecessors under the same act (Tr., pp. 44-5, 47-8).

The **7th assignment** of error is with respect to the decision of the Supreme Court that the claim of plaintiffs in error, to the percolating waters in their land under the Mexican grants and United States Patents through which they derived title, was invalid (Tr., p. 807).

The **14th assignment** is that the Supreme Court erred in holding that the condemnation statute was

valid as to its provision authorizing the taking of property without paying its actual value or just compensation (Tr., p. 808).

The **15th assignment** is that the Supreme Court erred in deciding that plaintiffs in error were not entitled under the 14th Amendment to just compensation (Tr., p. 808).

The **17th assignment** is that the Supreme Court erred in holding valid the provision of the condemnation statute, authorizing the jury to determine both the property condemned, the interest of the defendants therein and the amount of compensation to be paid therefor (Tr., p. 808).

The **18th assignment** is that the Supreme Court erred in upholding the validity of the authority exercised by the Superior Court in taking the property of plaintiffs in error, and in not deciding that the proceedings were repugnant to the Fourteenth Amendment (Tr., p. 808).

The **19th assignment** is that the Supreme Court erred in deciding that the property of plaintiffs in error could be taken without just compensation, and that the proceedings and decisions of the trial Court did not deprive them of their property without due process of law, and did not deny to them the equal protection of the laws, and did not impair the obligations of the Mexican grants and United States Patents (Tr., pp. 808–9).

The **20th assignment** is that the property of plaintiffs in error was taken without due process of law by the decision of the Supreme Court approving the instructions of the trial Court to the jury, to the effect that the rights of plaintiffs in error to use the waters of the Los Angeles River were subordinate to the

paramount right of the city to supply its inhabitants living outside of the pueblo lands patented to it, and that the paramount right of the city was measured by the necessity, and that, if the needs of the city should increase in the future, the right would expand to include all the needs required; and also that the decision of the Supreme Court, affirming these instructions, impaired the obligations of the Spanish and Mexican grants, and deprived plaintiffs in error of their property without due process of law in violation of the Constitution of the United States (Tr., pp. 809-811).

The **24th assignment** is that the decision of the Supreme Court, approving the instructions of the trial Court with regard to the definition of an underground stream, and charging that the facts proven on the trial showed the existence of such a stream, was in violation of the Constitution of the United States, and deprived plaintiffs in error of their property without due process of law (Tr., pp. 813-817).

The 25th assignment is that the section of the condemnation statute (Section 1249 Code of Civil Procedure) of California, providing that the compensation and damages should be deemed to have accrued at the date of the summons and that the actual value of the property at that date should be the measure of compensation, according to the interpretation placed thereon by the Supreme Court, namely, that the market value was the standard, and that no subsequent discoveries after the commencement of the action could be considered by the jury in estimating such value—was in violation of the Constitution of the United States, and such decision deprived plaintiffs in error of their property without due process of law (Tr., pp. 817-819).

The 26th assignment is to the effect that the Supreme Court ought to have reversed the judgment of the Superior Court, and ought to have decided against the validity of the State statutes and the authority exercised thereunder for the condemnation of the property, and that such statutes were repugnant to the Constitution of the United States, and that the instructions of the trial Court deprived plaintiffs in error of their property without due process of law and denied them the equal protection of the law (Tr., p. 819).

(THE OPINION of the Supreme Court of California is reported in 124 Cal., at page 597, and in the record of the present case, pp. 689–724). The dissenting opinion of the Chief-Justice precedes the prevailing opinion of the other Justices, and affirms the rulings of the Court below with regard to the main questions in controversy, namely, the paramount right of the city to the waters of the Los Angeles River so far as related to its pueblo lands, and the fact that the underground waters in the land sought to be condemned formed part of the subterranean flow of the Los Angeles River (124 Cal., pp. 604–647).

ARGUMENT.

I.

Inasmuch as the question, that the condemnation statute of California is in conflict with the Federal Constitution, was not raised in either the trial Court or the State Supreme Court, and was not passed upon by either of those Courts, there is no jurisdiction in this Court to review the judgment of the Supreme Court of California.

Chicago, etc., Ry. vs. Chicago, 164 U. S., 454.
Eastern Build. Assn. vs. Welling, 181 U. S., 47.
F. G. Oxley Stave Co. vs. Butler Co., 166 U. S., 648.
Hamilton Co. vs. Massachusetts, 6 Wall, 632.
Scudder vs. Coler, 175 U. S., 32.
Capital City Dairy Co. vs. Ohio, 183 U. S., 238.
Erie R. R. Co. vs. Purdy, 185 U. S., 148.
Michigan Sugar Co. vs. Michigan, 185 U. S., 108.
Dewey vs. Des Moines, 173 U. S., 193.
Parmalee vs. Lawrence, 78 U. S., 36.
Chapin vs. Fye, 179 U. S., 127.
Lawler vs. Walker, 14 How., 149.
Miller vs. Texas, 153 U. S., 535.
Caldwell vs. Texas, 137 U. S., 692.
Duncan vs. Missouri, 152 U. S., 377.
Spies vs. Illinois, 123 U. S., 131.
Chemical Bank vs. Portage, 160 U. S., 642.
Morrison vs. Watson, 154 U. S., 111.
O'Neil vs. Vermont, 144 U. S., 458.
Miller vs. Cornwall R. R., 168 U. S., 131.

Levy vs. Superior Court, 167 U. S., 175.
Louisville, etc., R. R. vs. Louisville, 166 U. S., 709.
Powell vs. Supervisors of Brunswick Co., 150 U. S., 433.
Sayward vs. Denny, 158 U. S., 180.
Connecticut, etc., Co. vs. Woodruff, 153 U. S., 689.

The claim now made that the condemnation statute of California is in conflict with the Constitution of the United States was evidently an after-thought of plaintiffs in error, for such a contention is not even hinted at any place in the record.

On the contrary, the statute was evidently assumed by all parties to be valid in every respect. The contention of plaintiffs in error was only as to the proper construction of the statute, they claiming that what they called actual value and not market value should be taken as a criterion in fixing the valuation of the land sought to be condemed.

The claim of a Federal question was not even raised in the petition for rehearing in the State Supreme Court, although, had it there been made, it would have been too late.

Foster's Fed. Prac. (3d ed.), 1187 Notes, 44, 47.
Turner vs. Richardson, 180 U. S., 87.
Caldwell vs. Texas, 137 U. S., 692.
Miller vs. Texas, 153 U. S., 535.
Duncan vs. Missouri, 152 U. S., 377.

The first place where we find any reference to an infringement of the rights of plaintiffs in error under the Federal Constitution is in the petition for the

writ of error and in the assignment of errors in this Court.

A Federal question cannot be raised for the first time in the assignment of errors in the United States Supreme Court.

Leeper vs. Texas, 139 U. S., 462.
Chapin vs. Fye, 179 U. S., 127.
Ansbro vs. U. S., 159 U. S., 695.
Claassen vs. U. S., 142 U. S., 140.

The petition for a writ of error forms no part of the record.

Clark vs. Pennsylvania, 128 U. S., 395.
Leeper vs. Texas, 139 U. S., 462.

All of the assignments of errors, with the exception, possibly, of the 7th, 14th, 15th, 17th, 18th, 19th, 20th, 24th, 25th and 26th, refer to alleged errors of the Court below with regard to matters unconnected with a Federal question.

The claim of plaintiffs in error, that they obtained title to the percolating waters in their lands under the Mexican grants and United States Patents, we shall discuss under a separate point.

With reference to the **14th assignment**, that the Supreme Court erred in holding that the condemnation statute was valid, although it authorized the taking of the lands of plaintiffs in error without paying the actual value thereof or just compensation therefor (Tr., p. 808), no claim was made in either of the State Courts that such statute was invalid or that it had the effect of taking property without paying the actual value thereof or making just compensation therefor.

So with reference to the **15th assignment**, that

the Supreme Court erred in holding that the plaintiffs in error were not entitled by the 14th amendment to just compensation as a condition to taking their property for public use (Tr., p. 808), no claim was made by them in the State Court that the Constitution of the United States gave them such a right, nor did the State Courts hold that plaintiffs in error were not entitled to such compensation, but, on the contrary, those Courts assumed that they were, and held that they had, in fact, received all the compensation that the law gave them.

The **17th assignment** of error is that the Supreme Court erred in holding that the condemnation statute, which gave the jury power to determine both the property to be condemned and the interest of owners therein and the compensation to be paid therefor (Tr., p. 808) was valid, but no claim had been made by plaintiffs in error that the statute was invalid in that respect, their contention being, as may be seen from the opinion of the Chief Justice, that, by a proper construction of the statute, the conflicting claims of the plaintiff and defendants in the proceeding could not be adjudicated.

No claim at all was made in the State Courts that the statute as construed was invalid under any clause of the Federal Constitution.

(See opinion in 124 California, at pages 607–614; reprinted in the Record of the present case pp. 689–724).

This, however, related only to a matter of Court procedure, which it is always competent for the State to regulate.

In the case of *Long Island Water Supply Company vs. Brooklyn*, 166 U. S., 685, which, like the present case, was a condemnation case on writ of error to a

State Court, this Court said, Mr. Justice BREWER giving the opinion (page 688):

"So far as respects any mere matter of *procedure*, or of conflict between the statute authorizing the condemnation or the proceedings had thereunder and the constitution of the State, the decision of the Court of Appeals is conclusive. *West River Bridge Company vs. Dix*, 6 How., 507; *Bucher vs. Cheshire Railroad*, 125 U. S., 555; *Adams Express Company vs. Ohio*, 165 U. S., 194. Our inquiry must be directed to the question whether any rights of the water supply company secured by the Constitution of the United States have been violated."

See, also,

Louisville, etc., R. R. Co. vs. Schmidt, 177 U. S., 230;
Erie R. R. Co. vs. Purdy, 185 U. S., 148;
Backus vs. Fort, etc., R. R., 169 U. S., 557;
Spies vs. Illinois, 123 U. S., 121;
Rothschild vs. Knight, 184 U. S., 334;
Simon vs. Craft, 182 U. S., 427.

The **18th assignment** is to the effect that the Supreme Court erred in upholding the validity of the authority exercised by the trial Court in taking the property of plaintiffs in error and in not deciding that the proceedings in the suit were repugnant to the 14th amendment (Tr., p. 808).

The upholding by the Supreme Court of the authority of the Superior Court to exercise the jurisdiction conferred on it in trying the condemnation case, does not present a federal question, nor, as already remarked, did the plaintiffs in error claim that such proceedings were in violation of the Fourteenth Amendment; nor did they invoke the protection of that amendment.

Moreover, the Supreme Court was not called upon to, nor did it pass upon the question as to whether the

proceedings were repugnant to the Fourteenth Amendment.

The **19th assignment** is that the Supreme Court erred in holding that the property of plaintiffs in error could be taken without just compensation; and that the proceedings and rulings of the trial Court did not deprive plaintiffs in error of their property without due process of law, and did not deny to them the equal protection of the laws, and did not impair the obligation of the contracts evidenced by the Spanish and Mexican grants and United States patents (Tr., p. 808–9).

The Supreme Court did not decide that the property of plaintiffs in error could be taken without just compensation.

Neither did it decide that the proceedings and rulings of the trial Court did not deprive plaintiffs in error of their property without due process of law, nor deny them the equal protection of the laws, nor impair the obligation of the grants and patents, for that Court was not called upon to determine those questions, no such contention having been made there.

The **20th assignment** of error is that the Supreme Court erred in sustaining the rulings of the trial Court to the effect that the city was entitled to the paramount right to use the waters of the Los Angeles River for territory within its limits which was not embraced within the original pueblo lands, and to maintain lakes in the public parks, and that such decision deprived plaintiffs in error of their property without due process of law, and impaired the obligation of the grants and patents under which they claimed (Tr., pp. 808–811).

Again, we say that plaintiffs in error did not claim in the State Courts that their property was taken without due process of law by reason of any ruling or decision.

Neither did the State Courts uphold any statute of California which purported or tended to affect in any way the grants and patents under which plaintiffs in error claimed, nor was it contended in the State Courts that any State statute, or the decision in the case at bar, had that effect.

The **24th assignment** of error is that the Supreme Court erred in sustaining the rulings of the trial Court concerning the law with regard to subterranean waters, and in holding that plaintiffs in error were not the owners of the underground waters in their land, and were not entitled to compensation for the value of the land by reason of the presence of those waters, and that the decision is in violation of the Constitution of the United States and deprived plaintiffs in error of their property without just compensation and without due process of law (Tr., pp. 813–817).

Our remarks concerning the failure of plaintiffs in error to make the claim contained in this assignment apply here.

The **25th assignment** of error is that the Supreme Court erred in sustaining the instructions of the trial Court to the effect that the market value of the property controlled and not the true value, and that Section 1249 of the Code of Civil Procedure of the State, which was interpreted by the Supreme Court to permit of the fixing of such a value, was in violation of the United States Constitution, and that the decision deprived plaintiffs in error of their property without due process of law (Tr., pp. 817-819).

No exception was taken in the trial Court to the in-

struction on the ground specified in this assignment, but the only objection there made was that market value was not the measure of compensation, and that there was no evidence on which to base the instruction that the jury were not to consider anything done or discovered since the commencement of the action with regard to the existence of underground waters, and that there was no evidence that the land possessed any element of value which was not known at the time of the commencement of the action (Tr., p. 661).

The **26th assignment** of error is a restatement of some or all of the other assignments, and need not be further noticed.

The findings of fact and the verdict of the jury as to the amount of compensation for property taken, and as to the amount of damages to property not taken are conclusive, provided no erroneous rule was laid down by the Court or adopted by the jury in arriving at such amounts; and no Federal question is raised thereby or was presented to or decided by the State Courts.

This principle was clearly stated by this Court in *Long Island Water Supply Company vs. Brooklyn*, 166 U. S., 685, which case, like this one, was a condemnation case on writ of error to a State Court. Mr. Justice BREWER, giving the opinion of the Court, said (p. 695):

"It may be true, as contended, that, as construed by the Court of Appeals, the determination of the commissioners is conclusive as to the mere value of the property, but there is no denial of due process in making the findings of fact by the triers of fact, whether

commissioners or a jury, final as to such facts, and leaving open to the Courts simply the inquiry as to whether there was any erroneous basis adopted by the triers in their appraisal, or other errors in their proceedings."

So also this Court, in *Jenkins vs. Neff*, 186 U. S., 230, on writ of error to a State Court said, Mr. Justice BREWER giving the opinion of the Court (p. 235):

"It is well settled that the findings of fact in the State Courts are on a writ of error conclusive with us. *Hedrick v. Atchison, Topeka &c. Railroad*, 167 U. S., 673, 677, and cases cited therein; *Bement v. National Harrow Co., ante*, 70. In other words, we apply the law to the facts settled in the State Courts, and we do not search the record to see if there be not disclosed by the testimony some other matters not embraced in the findings which may affect the conclusion."

The only reference in the record to any constitutional provision is that contained in the opinion of the Chief Justice, at page 643 of Volume 124, California Reports (Tr., p. 719), in which is mentioned the contention of plaintiffs in error that the statute authorizing the valuation of the property at the date of the summons was unconstitutional.

The presumption is that the reference here made was to the State Constitution.

Kansas Endowment, etc., Assn. vs. Kansas, 120 U. S., 103.
Miller vs. Cornwall, R. R., 168 U. S., 131.
Chapin vs. Fye, 179 U. S., 127.

But, as remarked by the Chief Justice at the place last referred to, the plaintiffs in error could not object to the instruction of the trial Court, requiring the jury

to take the date of the summons as the time for fixing the value, as they had themselves requested an instruction to this effect (Tr., p. 661).

A case precisely in point is *Spies vs. Illinois, 123 U. S., 131,* which case came to this Court on petition for a writ of error to the Supreme Court of the State of Illinois. The trial Court in that case made certain rulings which were sustained by the Supreme Court of Illinois on appeal. The Supreme Court of the United States dismissed the petition for a writ of error on the ground that no Federal question was involved. This Court said (page 181):

"*Even if the court was wrong* in saying that it did not appear that the Most letter was one of the papers illegally seized, it still remains uncontradicted that *objection was not made in the trial court to its admission on that account.* To give us jurisdiction under Sec. 709 of the Revised Statutes because of the denial by a state court of any title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was "specially set up or claimed" at the proper time in the proper way. To be reviewable here the decision must be against the right so set up or claimed. As the Supreme Court of the State was reviewing the decision of the trial Court, it must appear that the claim was made in that court, because the Supreme Court was only authorized to review the judgment for errors committed there, and we can do no more. This is not, as seems to be supposed by one of the counsel for the petitioners, a question of a waiver of a right under the Constitution, laws or treaties of the United States, but a question of claim. *If the right was not set up or claimed in the proper court below, the judgment of the highest court of the State in the action is conclusive, so far as the right of review here is concerned.* The question whether the letter, if obtained in the manner alleged, would have been competent evidence, is not before us, and, therefore, no foundation is laid under this objection for the exercise of our jurisdiction."

In the exceptions taken by plaintiffs in error to the instructions of the Court none was taken to instruction 2, which stated the rule that the date of the summons was to be taken as the time of valuation (Tr., p. 654).

Under exception 49 to instruction 15 (Tr., p. 660) plaintiffs in error expressly say that they were entitled to the value at the date of the summons.

It is true that plaintiffs in error, in exception 54 (Tr., p. 661), say that they except to every instruction that the value at the date of the issuance of summons is the measure of their right to recover; but they had waived the error, if any, in the instruction by requesting the same instruction themselves, even if such a general exception was sufficient under the California practice, which required the exception to the charge of the Court, given of its own motion, to refer specifically to the instruction complained of.

Payne vs. Treadwell, 16 Cal., 220.
Robinson vs. W. P. R. R. Co., 48 Cal., 409.
Brown vs. Kentfield, 50 Cal., 129.
Cockrill vs. Hall, 76 Cal., 192.

Looking at the exceptions taken by plaintiffs in error to the instructions of the trial Court to the jury, it will be seen that not one of them referred to the Constitution, laws or treaties of the United States, either by claiming that a State statute or proceeding was in violation thereof, or in invoking the protection of that Constitution or any statute, authority or treaty of the United States, but other grounds of exception were specifically stated.

The practice in California, as in the United States Courts, forbids the reversal of a judgment for error in instructions on grounds not assigned in the trial Court.

Payne vs. Treadwell, 16 Cal., 220, *supra.*
Robinson vs. W. P. R. R. Co., 48 Cal., 409, *supra.*
Brown vs. Kentfield, 50 Cal., 129, *supra.*
Cockrill vs. Hall, 76 Cal., 192, *supra.*
Los Angeles vs. Pomeroy (case at bar), 124 Cal., 630.
May's U. S. Supreme Ct. Prac., p. 459.

The rule is established in this Court that, if plaintiffs in error, having the opportunity, did not comply with the State practice in making objections and taking exceptions in such manner as to authorize the State Supreme Court to reverse the judgment, the United States Supreme Court will not take jurisdiction to consider alleged errors in the trial Court which could not have been passed upon by the State Supreme Court under the practice prevailing there.

Spies vs. Illinois, 123 U. S., 121, quoted, *supra.*
Miller vs. Texas, 153 U. S., 535.
Duncan vs. Missouri, 152 U. S., 539.
Chemical Bank vs. Portage, 160 U. S., 642.
Morrison vs. Watson, 154 U. S., 111.
O'Neil vs. Vermont, 144 U. S., 323.
N. P. R. R. Co. vs. Ellis, 144 U. S., 458.
Brown vs. Massachusetts, 144 U. S., 573.
Erie R. R. Co. vs. Purdy, 185 U. S., 148, quoted *infra.*
Baldwin vs. Kansas, 129 U. S., 52.
Chapman vs. Bradshaw, 128 U. S., 132.
Backus vs. Fort, etc., R. R. Co., 169 U. S., 557.

It will be seen from the instructions of the trial Court appearing in transcript (pages 642-654) that the jury were instructed concerning the respective rights of the defendant and plaintiffs in error so that plaintiffs in error, had they chosen to do so, could easily have entered an exception on the ground that the instructions were in violation of their rights under the Federal Constitution, but not a word was mentioned which indicated that they even imagined that any right, which was protected by that Constitution, was being infringed, and the State Supreme Court evidently did not suspect that, in deciding the case, they were passing on any federal question whatever.

The language used by this Court in *Scudder vs. Coler*, 175 U. S., 32, is applicable to the case at bar, it being said by this Court there:

"It is impossible, upon this record, to avoid the conclusion that it never occurred to plaintiff in error to raise a Federal question until after the case had been finally decided against him in the highest Court of the State."

In *Bolln vs. Nebraska*, 176 U. S., 83, it is said with regard to the rule of this Court not to notice Federal questions unless they are raised in the State Court:

"We have repeatedly decided that an appeal to the jurisdiction of this Court must not be a mere afterthought, and that if any right, privilege or immunity is asserted under the Constitution or laws of the United States, it must be specially set up and claimed before the final adjudication of the case in the court from which the appeal is sought to be maintained."

We submit, then, that the attempt of the plaintiffs in error to invoke the jurisdiction of this Court should be held to be subject to "the rule ordinarily applica-

ble to the after-thoughts of counsel", as remarked by this Court in *Caldwell vs. Texas*, 137 U. S., 692.

While a distinction exists between the first clause and the second and third clauses of Section 709 U. S. Revised Statutes, it has always been held necessary that the record, taken in conjunction with the opinion of the State Supreme Court or the certificate of that Court or of its Chief Justice, should show clearly and distinctly that a Federal question was raised in the State Court and was, either expressly or impliedly, decided by that tribunal.

In *Eastern Building Assn. vs. Welling*, 181 U. S., 47, it was thus declared:

"The assertion that, although no Federal question was raised below, and although the mind of the State Court was not directed to the fact that a right protected by the Constitution of the United States was relied upon, nevertheless, it is our duty to look into the record and determine whether the existence of such a claim was not necessarily involved, is demonstrated to be unsound by a concluded line of authority."

In *Lawler vs. Walker*, 14 How., 149, the rule was thus declared:

"The conflict of the State law with the Constitution of the United States, and a decision by a State court in favor of its validity, must appear on the face of the record before it can be re-examined in this Court. It must appear in the pleadings of the suit or from the evidence in the course of the trial in the instructions asked for, or from exceptions taken to the rulings of the Court."

In *Hamilton Co. vs. Massachusetts*, 6 Wall., 632, it was said:

"Clear and necessary intendment that the [Federal] question was raised and must have been decided as claimed, in order to have induced the judgment, is

sufficient; but it is not sufficient to show that such a question might have arisen and been applicable to the case, unless it appears in the record that it did arise and was applied by the State Court in disposing of the controversy."

In *Chicago etc. Ry. vs. Chicago*, 164 U. S., 454, which was a case involving proceedings for the opening of a street in Chicago, where only one dollar damages had been awarded to a railroad company, the plaintiff in error, the company, did not raise the Federal question either in the trial or Supreme Court of Illinois, but did so for the first time in the assignments of error in this Court, which said, in dismissing the writ of error:

"In view of these assignments of error, it is not strange that the Supreme Court of Illinois made no reference in its opinion to the clause of the Constitution of the United States which, in this court for the first time, is invoked to sustain the proposition that the company's property has been taken without due process of law. It disposed of the case upon general principles of law, and does not appear to have considered it with reference to any provision of the Constitution of the United States. At any rate, as the company did not specially set up or claim any right, title, privilege, or immunity under the Constitution of the United States, this Court is without jurisdiction to review the final judgment of the State Court."

In *Bridge Proprietors vs. Hoboken Co.*, 1 Wall., 143, the rule was thus stated:

"The true and rational rule is that the Court must be able to see clearly, from the whole record, that a certain provision of the constitution or act of Congress, was relied on by the party who brings the writ of error, and that the right there claimed by him was denied."

In *California Powder Works vs. Davis*, 151 U. S., 389, it was held that it must affirmatively appear, not only that a Federal question was presented for decision

by the State Court, but that this decision was necessary for a determination of the case, and that it was actually decided, or that the judgment, as rendered, could not have been given without deciding it; and that, where jurisdiction depends upon the denial by a State court of a title etc. claimed under the constitution etc. of the United States, it must appear on the record that such title etc. was specially claimed at the proper time and in the proper way, and that the decision was against the right so set up or claimed.

In *Erie R. R. Co. vs. Purdy*, 185 U. S., 148, which was one of 21 actions brought against a railroad company to recover penalties under a State statute, the defendant railroad company pleaded that the statute was unconstitutional and void because in violation of the provisions of the United States Constitution in regard to commerce between the States, and also because it was in violation of various other provisions of the Constitution of the United States and of the State of New York; and, at the trial, the company moved for a nonsuit on the ground that the State legislation, if intended to apply to its lines, was void, because it undertook to interfere with or regulate commerce among the States and the acts of Congress in such case made and provided.

The State Court of Appeals held that the protection of the Fourteenth Amendment, not having been invoked in the trial Court, could not be raised on appeal under the State practice, and that the statute did not refer to interstate commerce, and, therefore, the objection raised on the ground of interference with that provision of the Federal Constitution did not have force.

This Court dismissed the writ of error for want of

jurisdiction, and held that, as the question under the Fourteenth Amendment had not been raised in the Court below and the Court of Appeals had refused to consider it for that reason, the United States Supreme Court could not pass on the claim made for the first time in the assignment of errors; and the Court say that if the railroad company had stated in its notice for nonsuit, or in some other way, distinctly that the statute was inconsistent with the amendment, then it would have been the duty of the Court of Appeals to have considered it, and that the question whether or not the claim of a right or privilege under the Constitution or laws of the United States was sufficiently brought to the notice of a State Court was itself a Federal question, in the decision of which this Court was not concluded by the view of the highest State Court; and also that, if the highest State Court sustains the validity of a State enactment drawn in question there, as repugnant to the Constitution, treaties or laws of the United States, or denies a right, etc., specially set up in the Court for the first time under the Constitution, treaty, statute or authority exercised under the United States, this Court will review the judgment, although no Federal question was distinctly raised or insisted on in the trial Court.

The Court then say :

" We, therefore, cannot hold that the Court of Appeals, by its final judgment, sustained the validity, under the Constitution of the United States, of the statute drawn in question by the defendant, or that it denied any right or immunity now claimed by it under the Fourteenth Amendment; for that Court simply declined to consider any Federal question except that made under the commerce clause of the Federal Constitution, assigning as the reason therefor that no point was made at the trial in respect of any other

clause of that instrument. In so holding, the Court followed the settled rule of practice in that State. On that practice alone was based its refusal to consider a Federal question not brought to the attention of the trial court [citing New York cases]. Now, when a party, drawing in question, in this Court, a State enactment as invalid under the Constitution of the United States, or asserting that the final judgment of the highest court of a State denied to him a right or immunity under the Constitution of the United States, *did not raise such question* or specially set up or claim such right or immunity in the trial court, this Court cannot review such final judgment and hold that the State enactment was unconstitutional, or that the right or immunity so claimed has been decided by the highest court of the State, if that court did nothing more than decline to pass upon the Federal question because it was not raised in the trial court as required by the State practice (*Spies vs. Illinois*, 123 U. S., 131, 181; *Miller vs. Texas*, 153 U. S., 535, 538; *Morrison vs. Watson*, 154 U. S., 111, 115). Of course, if upon examining the record, this Court had found that a Federal question was properly raised, or that a Federal right or immunity was specially claimed, in the trial court, then our jurisdiction would not have been defeated by the mere failure of the highest court of the State to dispose of the question so raised or to pass upon the right or immunity so claimed."

In *Michigan Sugar Co. vs. Michigan*, 185 U. S., 112, it was held that, where plaintiff in error applied for a mandamus to compel the Auditor-General to draw a warrant in his favor for moneys claimed to have been earned under a beet sugar bounty act and another act making appropriation to pay the bounties, and the State Court decided that the bounty act was in conflict with the State Constitution, and also that the subsequent act did not make a specific appropriation to pay the bounties, and no reference was made to the United States Constitution in the petition for mandamus, this Court had no jurisdiction.

It was said that the case did not fall within the first or second subdivisions of Section 709, United States Revised Statutes, and that, as to the third class, no right etc, was specially set up under the Constitution, etc., and denied ; but it was further said :

" The Supreme Court of the State did not refer to the Federal Constitution or consider or decide any Federal question. For aught that appears, the Court proceeded in its determination of the cause without any thought that it was disposing of such a question. The rule is firmly established, and has been frequently reiterated, that the jurisdiction of this Court, to re-examine the final judgment of a State Court under the third division of Section 709, cannot arise from mere inference, but only from averment so distinct and positive as to place it beyond question that the party bringing the case here from such court intended to assert a Federal right. The statutory requirement is not met unless the party unmistakably declares that he invokes, for the protection of his rights, the constitution or some treaty, statute, commission or authority of the United States."

From an examination of the record in the State Court, and of the opinions of the Supreme Court in the case at bar, it is evident that that Court never intended or felt called upon to decide that the condemnation statute was in conflict with the Federal Constitution, but that the only thing involved with regard to that statute was its proper construction.

In *Miller vs. Cornwall R. R. Co.*, 168 U. S., 131, holding that the reference to the Constitution generally would be taken to mean the State Constitution, it was said :

" The validity of a statute is drawn in question whenever the power to enact it, as it is by its terms, or is made to read by construction, is fairly open to denial, and is denied. *Baltimore & Potomac Railroad Co. vs. Hopkins*, 130 U. S., 210, 224 (32 : 908, 913). And under Section 709 of the Revised Statutes, if the

ground on which the jurisdiction of this court is invoked, is that the validity of a state law was drawn in question as in conflict with the Constitution of the United States, and the decision of the State Court was in favor of its validity, this must appear on the face of the record, before the decision below can be re-examined here. *Dibble vs. Bellingham Bay Land Company*, 163 U. S., 63, 70 (41 : 72, 74)."

In *Capital City Dairy Co. vs. Ohio*, 183 U. S., 238, it was held that questions, which were not raised in and decided by the State Courts, could not be considered by this Court.

The California practice does not differ from that prevailing in other States or in the United States Courts with regard to the requirement that objections must be made in the trial Court, to the rulings of that Court, in order to justify the Appellate Court in reversing for error.

Section 646, California Code Civil Procedure.
Morgan vs. Hugg, 5 Cal., 479.
Woods vs. Jensen, 130 Cal., 200

We cite only the first and last cases which we have found on a cursory examination, but there are hundreds of cases holding or assuming the same rule.

II.

No Federal question was raised or decided in the State Courts with respect to the right of the plaintiffs in error to the underground water in the land sought to be condemned, nor with respect to the

paramount right of the City of Los Angeles to the waters of the Los Angeles River.

The right claimed by the plaintiffs in error was derived through Spanish and Mexican grants confirmed and patented by the United States. That the right here claimed by the plaintiffs in error is not a federal question was passed upon and decided adversely to the contention of plaintiffs in error in the case of *Crystal Springs Land and Water Company vs. City of Los Angeles*, 177 U. S., 169. In that case, the Crystal Springs Land and Water Company also claimed under two Mexican grants and United States patents based thereon, one of which grants was the San Rafael Rancho, in which part of the land of plaintiffs in error in the case at bar is situated.

The complainant in that case sued to quiet title to certain alleged percolating waters which it had developed on its lands, and it was alleged that the city claimed to own the water as part of the Los Angeles River under the Spanish and Mexican laws as successor of the Mexican pueblo and by virtue of the grants contained in the charters referred to in the record of the case at bar. The city answered denying that it claimed under the charters, but alleging that its rights arose out of the grants made by the Spanish and Mexican laws to pueblos, and also out of divers other grants and judgments as well as long continued user. The Circuit Court dismissed the bill as not involving a Federal question, and this Court affirmed the decision on appeal.

That case is exactly in point and the decision therein requires the dismissal of the present case for the want of a Federal question, so far as this point is concerned.

No right of the plaintiffs in error is protected by the treaty of Guadalupe Hidalgo.

The provisions in reference to the rights of private Mexican citizens are contained in Articles VIII. and IX. of that treaty.

Article VIII. guarantees only the rights of ownership in favor of Mexicans who do not elect to become citizens of the United States, and their heirs and grantees; and not only it does not appear that the plaintiffs in error come within this category, but the contrary is actually the fact.

Article IX. protected the rights of Mexican citizens who elected to become citizens of the United States, *only until California should have been admitted to the Union*, after which time they became a part of the people of the State, with the same guarantees, and no other, that their fellow citizens had.

This principle was squarely decided by this Court in the case of *New Orleans vs. Armas*, 9 Peters, 223, construing a similar provision in the treaty between France and the United States. There the plaintiff claimed title from the Spanish Government, and the defendant City of New Orleans (plaintiff in error) claimed it as part of the city lands, and as not grantable by the Crown.

The Court, in its opinion, stated that

" *to sustain the jurisdiction of the Court* in the case now under consideration, *it must be shown that the title set up by the City of New Orleans is protected by the treaty* ceding Louisiana to the United States, or by some act of Congress applicable to that title."

The provisions of that treaty were:

" The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted according to the principles of the Constitution

to the enjoyment of all the rights, etc., of citizens of the United States, and *in the meantime* they shall be maintained and protected in the free enjoyment of their liberty, property and religion."

The Court says :

"Had any of these rights been violated, the individual might have brought his case in this Court under Section 25 of the Judiciary Act. But this stipulation ceased when Louisiana was admitted as a State. The right to bring questions of title, decided in the State Court, before this tribunal, is not classed among these immunities. The inhabitants of Louisiana enjoyed all the advantages of American citizenship in common with their brethren in their sister States when their titles are decided by the tribunals of the State."

It is also said (with regard to the contention that the City of New Orleans was protected in its rights to the land in controversy by the general terms of the treaty) :

"The judgment of the State Court appears on the record to have been determined on (and certainly ought to have been determined on) the opinion entertained by that Court of the legal rights of the parties under the crowns of France and Spain. The case involves no principle on which this Court could take jurisdiction which would not apply to all the controversies respecting titles originating before the cession of Louisiana to the United States. It would also comprehend all controversies concerning titles in any of the new States, since they are admitted into the Union by laws expressed in similar language."

This case does not seem to have been cited, and the distinction between the rights of Mexican citizens, who elected to become citizens of the United States, and the rights of those who continued to be Mexican citizens, was not apparently noticed in *Phillips vs. Mound City Land & Water Assoc.*, 124 U. S., 605, and

other cases passing upon the rights of owners of Mexican grants in California.

Again, even if such rights continue to be protected, plaintiffs in error could not invoke that treaty in the present suit, for the reason that (as stated in the last cited case of *Phillips vs. Mound City Land & Water Assoc.*) the treaty

"neither created the rights nor defined them; their existence was not made to depend on the constitution, laws or treaties of the United States. There was nothing done but to provide that if they did in fact exist under the Mexican Law, or by reason of the action of the Mexican authorities, they should be protected. Neither was any provision made as to the way of determining their existence. All that was left by implication to the ordinary judicial tribunal. Any Court, whether state or national, having jurisdiction of the parties and of the subject matter of the action, was free to act in the premises."

The doctrine announced in that case was sustained in *California Powder Works vs. Davis*, 151 U. S., 395, which was decided in the State Court.

There, the respective parties each claimed under a different confirmed and patented Mexican grant, and the State Court had found that one of the grants had been, by forgery, antedated. This Court held that the determination of that fact was within the province of the State tribunals, and that, although such determination limited the effect of the grant and the patent issued thereon, yet no federal question arose.

Plaintiffs in error here claim that the effect of the Mexican grants, under which they derive title, was to vest in them the percolating water in the lands, if any existed; but whether this is true or not depends, not upon the constitution or a law or treaty of the United States, but upon the law of Mexico and of California,

regulating this matter, which it is always competent for the government exercising police powers to provide for.

In the *Phillips case* the plaintiff in error contended that the treaty of Guadalupe Hidalgo protected him in the rights which were vested in his grantor at the time of the cession to the United States, and that, at that time, his grantor held a portion of a Mexican grant (afterward patented) by virtue of a partition had under the Mexican regime, and that the effect of the United States patent was to vest in him the title to that portion of the grant and not simply an undivided interest in the whole ranch.

With regard to the other phase of the question, as to whether the case arises under a law of the United States, the above cited cases of *Phillips vs. Mound City Land and Water Assoc., and Crystal Springs L. & W. Co. vs. Los Angeles*, 177 U. S., 169, conclusively determine this question in the negative.

The right to the percolating waters in the lands condemned is not derived through a law of the United States, if such right ever existed; it must be claimed under the laws of Mexico in force at the time of the cession of California to the United States.

The patent for a confirmed Mexican grant is altogether different from one of a mining claim or government land. The latter passes property which was confessedly that of the United States; whereas the former not only does not purport to convey the property of the United States, but is equivalent to an express declaration that the land never belonged to the United States.

It is settled that the rights of private individuals to property in a ceded territory remain the same after the cession as before.

Mitchel vs. U. S., 9 Peters, 711.
U. S. vs. Moreno, 1 Wall., 400.
Adam vs. Norris, 103 U. S., 59.

The patent for a confirmed Mexican grant in California does not pass any title, but is merely equivalent to a declaration that the original grant was valid, and that the rights of property are such as attached to the grant at the time of the cession to the United States.

The case of *Botiller vs. Dominguez*, 130 U. S., 238, is not in conflict with this position, but is in accord with it. In that case, it was held that the failure to present for confirmation a Mexican grant barred the rights of claimants.

So, also, in *Adams vs. Norris*, 103 U. S., 591, *supra*, it was decided that, where a patent had issued for a confirmed Mexican grant, such patent was an admission that the rightful ownership had never been in the United States, but, at the time of the cession it had passed to the claimant and to those under whom he claimed.

There is no distinction in this regard between perfect and imperfect grants, for the patent has the conclusive effect of determining that the original grant was valid. Of course, if the pat entwere determined to be void, it would be a question arising under the laws of the United States; but, conceding that the patent is valid, the determination of what rights were attached to the patented land as easements, or to what servitudes it was subject during the existence of the Mexican law, does not involve a Federal question.

If the original grantees had conveyed their title prior to the cession of California, the confirmed title was subject to the conveyances already made and to all the contracts entered into by the then owners of the grant ; and, although it might require a suit to enforce some of these rights, as for instance, to obtain a conveyance of the legal title passed by the patent, yet the confirmation of the grant and the issuance of the patent would not affect any of these rights.

On the contrary, the **Act of March 3, 1851,** provides that the patent shall not affect the interests of third persons, showing that it was not intended to change the title but to confirm it as it already existed.

This is shown in the case of **Phillips vs. Mound City Land & Water Assoc., supra,** in which it is expressly declared that the patent did not, in equity, affect the rights of those who acquired title under the original grantees.

The case of **Botiller vs. Dominguez, supra,** also reiterates the same doctrine, and it is there said by the Court,

"obviously it [the act of March 3, 1851] was not intended to adjust or settle titles between private citizens making claim to the same lands."

The determination of what rights belong to lands included in a Mexican grant, for which a patent has been issued, so far as relates to percolating water or riparian rights, or easements or servitudes, depends not on the laws of the United States, but upon those of Mexico or of this State.

In **Kennedy vs. Hunt,** 7 How., 590 (cited and approved in Phillips vs. Mound City, etc., *supra),* it was determined by this Court that the question of the

rights to alluvion claimed by two different parties, by one under a Spanish grant confirmed by treaty, and by the other under an Act of Congress, involved no federal question, but belonged to the local law of the State to determine what the legal appurtenances to those lands, as well as other lands belonging to private individuals, were.

The same principle is declared in the following cases:

Eldridge vs. Trezevant, 160 U. S., 452.
Hardin vs. Jordan, 140 U. S., 371.
Williams vs. Eggleston, 170 U. S., 304.
St. Anthony Falls W. and P. Co. vs. Board, etc., 168 U. S., 349.
Illinois, etc., R. R. Co. vs. Illinois, 146 U. S., 387.
Shiveley vs. Bowlby, 152 U. S., 1.
Packer vs. Bird, 137 U. S., 661.
St. Louis vs. Meyers, 113 U. S., 566.
S. Louis vs. Rutz, 138 U. S., 226.
Barney vs. Keokuk, 94 U. S., 324.

To such an extent does the State control over the subject go, that land purchased from the United States in Louisiana is subject to the public servitude of having constructed thereon levees to protect the country from inundations of the Mississippi River.

Eldridge vs. Trezevant, 160 U. S., 452, *supra*.

It is true that the Supreme Court of California has held that percolating waters belong to the owner of the soil, so far as the right to appropriate the same for the benefit of the land is concerned; but this rule is based, not on an act of Congress, but upon the local law, which it was the province of the State Court to

determine, and that court might have decided the reverse without involving a federal question.

This is illustrated by the decisions of the State Supreme Court with regard to the rights of the owner of the land to the percolating waters therein. In the earliest cases, the general assertion was made (though not necessary to the decision), that the ownership of such waters was of the same character as of the minerals and other solid substances of which the land was composed.

Hanson vs. McCue, 42 Cal., 303.

Various applications of the doctrine were made in subsequent decisions, until the case at bar was determined, when the doctrine was clearly laid down and established that waters, mixed with sand and other permeable material, would constitute an underground water course, with all the rights attached to surface streams, if the conditions of a defined and restricted channel and certain course existed.

The latest case is that of *Katz vs. Walkinshaw*, 70 Pac. Rep. 663, in which the Court in banc held that, while the owner of the soil had the right to make a reasonable use of the percolating water on the land itself, he could not convey it away to other lands for use there.

The determination of this question in a different way would have been within the province of the State Court, for it was the ascertainment of what the State law was, which it is always competent for the State courts to do, and no Federal question arises from such determination, no matter how the proposition of law is decided.

A United States patent may in fact, be defeated, in part at least, by an erroneous determination in regard

to the boundaries of patented land; but this fact does not prevent the State courts from passing on the question of boundaries nor give the Federal courts jurisdiction to revise such action. The only requirement is that it be conceded that the patent was valid and passed title to the land therein purported to be granted; but the location of the boundaries of these lands is a fact, like any other fact, to be determined by the local courts.

The cases of *Martin vs. Hunter's Lessee*, 1 Wheat., 304; *Smith vs. Maryland*, 6 Cranch, 286; *Owings vs. Norwood's Lessee*, 5 Cranch, 344, all involve confiscation acts, which were the only basis of title opposed to the right of parties claiming under the treaty between the United States and Great Britain; in other words, the question was whether or not the State statutes were valid, for if they were not, then the title of the claimant (which was alleged to have been divested by the act of confiscation) was indisputably valid and sufficient.

The case of *Glasgow vs. Baker*, 127 U. S., 560, arose on the construction of an Act of Congress passed to carry out treaty stipulations, and had the effect *itself* of passing title *in præsenti*, and, as the result of the suit turned upon the construction to be given to this act, this Court properly held that it had jurisdiction.

The case of *Guitard vs. Stoddard*, 16 How., 508, explains the character of the rights created by the Act of Congress of 1812, which was construed in the case of *Glasgow vs. Baker, supra;* and it is there said that the statute had the effect of transferring the title, which had not passed from the former government.

In *Knight vs. Land Association*, 142 U. S., 161, the decision of the State Court had the effect of taking

away land which was included in the patent for the pueblo of San Francisco, thus annulling it and giving the land to the grantee of the State, which claimed under an act of Congress subsequent to the treaty. No one could doubt that this Court had jurisdiction in such a case, and to hold otherwise would be to say that the acts of Congress and proceedings taken under them could be made nugatory by a decision of the State Court.

The case of *McDonogh vs. Millaudon*, 3 How., 693, illustrates the principle for which we contend, that where the decision of the State Court is not in regard to the construction of an act of Congress, but, on the contrary, the act is given its full force and effect, and the only thing construed or considered is the law of the State or of the former government, or some question of fact, as with reference to boundaries, no federal question arises.

We quote from that case (p. 705):

"The treaty with France, of 1803, gave no further sanction to the boundary of McDonough's (claimant) title than it had by the grant; in respect to its validity, the decision of the State Court supported the claim to the same extent that the treaty protected it, and, therefore, the decision was not opposed to the treaty."

The Court then goes on to show that the McDonough title was a perfect one, and was confirmed by Congress as such, though such confirmation was not necessary, as it was good on general principles of law (the language of the act being that all complete titles be recognized as valid and complete against the United States), and then says (p. 706):

"But in McDonogh's case, as in other similar ones referred to above, the recognition extended only to the

boundary the grants themselves furnished according to their landmarks and true construction under the local laws in virtue of which they were obtained. * * * The State Court held McDonogh's title to be valid to every extent that it has been recognized by the laws of the United States, and only applied the local laws of Louisiana in its construction, so far as they had a controlling influence on the manner in which the side lines should be extended from the Mississippi river towards Lake Marurepas; and as, in so doing, neither the treaty of 1803 nor any act of Congress, or authority exercised under the United States, was drawn in question, this Court has no jurisdiction to revise the decision of the Court."

So in our case, the Court is informed by the record that the patents to the various Mexican grants, under which plaintiffs in error claim title, are conceded to be valid, and to pass the lands which they purport to grant, and it is only with reference to the underground waters which constitute part of the stream of the Los Angeles River, and which are claimed by the city under a species of easement, that the dispute exists.

To determine this question requires a construction of the laws of Spain and Mexico, and not of the United States or of the treaty with Mexico. This easement depends upon local laws, and is a police regulation which the State is competent to make. Claims for easements were not required to be presented by the act establishing the Land Commission for California, but the question of their existence was left to be determined by the local Courts.

In the same manner, the rights of the City of Los Angeles to the waters of the Los Angeles river depend upon the laws of Spain and Mexico, and not upon the Constitution, laws or treaties of the United States. The city did not claim to own the land of the plaintiffs in error, but expressly conceded that the owner-

ship of that property was vested in them, and the only contention was that an easement existed in favor of the city, as successor of the Spanish and Mexican Pueblo, to appropriate and use the waters of the Los Angeles river, so far as needed for the supply of its inhabitants and for municipal purposes. Subject to this easement, the plaintiffs in error received compensation upon the basis of an ownership in fee.

The right of the city to the waters of the Los Angeles river has been established by a series of decisions involving that right.

Felis vs. City of Los Angeles, 58 Cal., 73.
Vernon Irr. Co. vs. City of Los Angeles, 106 Cal., 237.
City of Los Angeles vs. Pomeroy (case at bar), 124 Cal., 597.

The doctrine concerning the rights of pueblos to the waters of the streams on which they were located, was announced in the case of *Lux vs. Haggin*, 69 Cal., 255.

As a matter of fact, the right of riparian owners on the Los Angeles river above the city, while spoken of as a riparian right, is really not based on the common law concerning riparian rights, but results from the situation of the lands and the inability of the city to use all of the water. The city is entitled to use all of the waters of the river so far as needed for its own purposes, and it necessarily results that, where all of them are not taken by the municipality, what are left may be used by those who have access to the stream by reason of their lands abutting thereon.

The Mexican ranchos, in which the land sought to be condemned is located, were granted for grazing

purposes only, the grants (which were introduced in evidence) showing that the lands were ceded for "ganado mayor" (neat cattle) (Tr., pp. 97–9).

In the plan of settlement of California by the Spanish government, the pueblos were the places in which irrigation was to be practised, and where grain and other produce, for the supply of the soldiers and other inhabitants, were to be raised, and everything was subordinated to the building up of those pueblos. By reference to the proceedings concerning the establishment of the Pueblo of Los Angeles, as well as that of San Jose, it will be seen that the purpose was to have a place where grain could be raised for the three presidios of the province (Tr., p. 90).

The idea of establishing the Pueblo of Los Angeles was announced as early as 1779, and on September 22, 1780, the Governor was empowered to establish the two Pueblos of Los Angeles and San Jose (Tr., 89). Both were located on account of the fertility of the soil and abundance of water for irrigation (Tr., pp. 89, 90).

On August 20, 1781, the Governor issued a decree for the establishment of the Pueblo of Los Angeles, and instructions were given with regard to the selection of a point on the Los Angeles River (then called the Porciuncula) at which to divert water for irrigation (Tr., p. 90).

The Pueblo was established at that time, and in 1786 a Commissioner was appointed to give titles to the soldiers for their lots and farming lands (Tr., p. 93).

On October 22, 1791, the Commandant-General fixed the limits of the two new Pueblos at four square leagues (Tr., p. 94).

In 1810 the priests of the Mission of San Fernando,

a few miles to the northwest of the Pueblo, diverted some of the water of the river, and complaint having been made to the Governor by the authorities, the result was that the mission fathers acknowledged the superior right of the Pueblo and agreed to remove the dam when it proved an injury to the irrigators there. (Tr., pp. 94–5).

In 1836 the same mission erected a dam on one of the sources of the river, and the same acknowledgment of the rights of the Pueblo was made as before, with a promise to remove the dam when it should be injurious (Tr., p. 99).

Counsel for plaintiffs in error have been unable to find any authority for the paramount right of pueblos to use the water of innavigable streams on which they were located or which had been diverted by them for use on the lands of their inhabitants.

They would have made this discovery had they attentively read the opinion in the case at bar (124 Cal., at page 641), in which the Chief Justice refers to the case of *Vernon Irrigation Company vs. Los Angeles*, 106 Cal., 237, as settling the law on this point.

Had counsel then read the latter case, they would have seen that it was there declared (at pages 248–9), referring to *Lux vs. Haggin*, 69 Cal., 255, that pueblos had the title to waters within their boundaries, subject to the public trust of continuously distributing the same in just proportion, and that they had a preference or prior right to consume the waters of a stream, to which they had given a common use and destiny, even as against the upper riparian proprietor.

In *Lux vs. Haggin*, 69 Cal., at pages 315 to 334, inclusive, the rights of pueblos to the waters of streams on which they were located, or the waters of which were

diverted by the inhabitants and brought down on lands within the pueblo, are discussed, and it is declared, at pages 329, 330, referring to Escriche, that only an inhabitant of pueblos, through which innavigable streams ran, could divert part of the waters thereof to irrigate his land or run his mill, provided he could do so " without prejudice to the common use and destiny which the pueblo shall have given the waters ; " and, also, still citing Escriche, that the owners of land, through which innavigable streams passed, could use the waters thereof " for the utility of their farms or industry, without prejudice to the common use or destiny which the pueblos in their course shall have given them," etc. ; and then, at page 331, is contained the declaration with regard to the paramount right of the pueblo to the waters of such streams referred to in the *Vernon Irrigation Co. case.*

It will be seen by reference to the opinion of the attorney of the Commandancy to the Commandant General, on the subject of concessions of lands in the Department of California, under date 1786 (Tr., pages 91-3), that it is recommended that the Commandant General order the Governor to allot to each pueblo four square leagues of land, in a square or oblong body as the nature of the ground will admit, and that he grant, outside of the limits of the pueblos and at a distance therefrom, ranchos for raising cattle ; and this opinion was transmitted by the Commandant General to the Governor, with instructions to make grants of land in conformity therewith (Tr., p. 93).

Counsel for plaintiffs in error have worked out a finely spun argument concerning the acquirement by their clients, of the rights to the waters of the river by the patents for the Mexican grants in which their land

is located, even going to the extent of questioning the right of the pueblo to any land or water by virtue of the laws of Spain and Mexico. They rely on the *Santa Fé case* (165 U. S., 674), as establishing the proposition that a Spanish or Mexican pueblo was not entitled to any land, but that case merely held that a pueblo established by private individuals and not under governmental direction, was not entitled to four square leagues, recognizing the fact that, where the establishment was by the government, an implied grant of that quantity did result, the location of the land to be afterwards established.

The Pueblo lands of the City of Los Angeles, acquired by its predecessor, the Pueblo, in 1781, were confirmed to it by the United States Board of Land Commissioners under the Act of Congress of 1851, and a patent was issued for the same land, as finally surveyed, in 1866 (Tr., pp. 76–7).

There is just about as much basis for the contention of plaintiffs in error concerning the weakness of the City's title to its Pueblo lands and its right to use the waters of the river, as there was for the claim, made before the Supreme Court of California, that, by the abolition of the ayuntamiento (council) the Pueblo itself was abolished, with the result that, when the city was organized in 1850, there was no Pueblo from which any water rights could be acquired (124 Cal., at page 641).

The claim of the city to its pueblo lands was not confirmed on the basis of a grant by the Governor in 1844, nor does the patent so recite; but the confirmation was

made on the grant contained in the laws of Spain in 1781 when the pueblo was founded.

What the patent of 1866 (for there was another one issued in 1875 on the supposition that the first was invalid, because no publication was made as required by Act of Congress, Tr., pp. 72–5) says is that the Mayor and Common Council of the City of Los Angeles filed that petition claiming confirmation of their title to 16 square leagues, said claim being founded on a Mexican grant "*to the petitioners*, made on the 25th day of August, 1844"; but that the claim was rejected as to all the land except four square leagues (Tr., pp. 76–7).

Now, there was never, of course, a grant made by the Mexican Governor in 1844, or at any other time, to the Mayor and Common Council of the City of Los Angeles, for that municipal corporation was not created till 1850; and, hence, the recital as to the grant is manifestly false.

Therefore, the patent does not show on what grant the claim was based; but, if this Court can take judicial notice of the decree of the Board of Land Commissioners, it will know that the confirmation was made on the grant contained in the laws of Spain in existence at the foundation of the pueblo in 1781.

That a governmental pueblo was entitled to have allotted to it four square leagues, and that when the claim therefor has been confirmed and patented to its successor, the rights of the municipal patentee relate back to the foundation of the pueblo has been held in a number of cases decided by this Court.

Thompson vs. Greely, 72 U. S ., 326.
Grisar vs. McDowell, 73 U. S., 363.
Palmer vs. Law, 98 U. S., 1.

Trenouth vs. San Francisco, 100 U. S., 251.
San Francisco vs. Le Roy, 138 U. S., 556.
Knight vs. United Land Assn., 142 U. S., 161.

The case of *Beard vs. Federy*, 70 U. S., 478 (from which plaintiffs in error have made a quotation), is in support of the doctrine that the patent for a confirmed Spanish or Mexican grant conclusively establishes the fact that the title to the patented land never was in the United States, but had been transferred by the former government to the patentee or his predecessors; for it is there said by the Court, (after stating the first effect of the patent, which statement is quoted in the brief of plaintiffs in error at pages 125–6):

"In the second place, the patent is a record of the action of the government upon the title of the claimant as it existed upon the acquisition of the country. Such acquisition did not affect the rights of the inhabitants to their property. They retained all such rights and were entitled by the law of nations to protection in them to the same extent as under the former government. The treaty of session also stipulated for such protection. The obligation, to which the United States thus succeeded, was of course political in its character, and to be discharged in such manner and on such terms as they might judge expedient. By the act of March 3d, 1851, they have declared the manner and the terms on which they will discharge this obligation. * * * When informed, by the action of its tribunals and officers, that a claim asserted is valid and entitled to recognition, the government acts and issues its patent to the claimant. * * * *By it, the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the Stipulations of the Treaty*, and might have been located under the former government, and it is correctly located now, so as to embrace the premises as they are surveyed and described."

The argument of plaintiffs in error that the title to the waters of the Los Angeles River passed to the United States on the cession or conquest of California and was then transferred by the patents for the Spanish or Mexican grants in which the land in question is located, is rather ingenious but fallacious: *First*, under the doctrine recognized in *Beard vs. Federy*, 70 U. S., 478, *supra*, and other cases cited by us, the title to these waters, so far as they are part of the soil of or are appurtenant to the lands through or along which that stream flows, is conclusively deemed to have been vested, prior to the cession, in the persons to whom the confirmed Spanish or Mexican grants were made, *as against the United States;* and *second*, under the rule invoked by plaintiffs in error as being laid down in *Lux vs. Haggin* (69 Cal., 255), cited by them, the Spanish and Mexican law, with regard to the title to the river waters, was expressly *continued* by the Act of April 4th, 1850 (Stats. 1850, p. 155), incorporating the City of Los Angeles, and declaring that it should succeed to all the rights, claims and powers of the Pueblo de Los Angeles in regard to property; and this statute preceded the Act adopting the common law (April 13th, 1850, Stats. 1850, p. 219).

If the State of California succeeded to the title to innavigable streams possessed by the Mexican Government, and the laws of that Government conferred on the pueblo of Los Angeles a paramount right to use the waters of the river, then the said Act of April 4th, 1850, had the effect of granting the same right to the pueblo's successor, the City of Los Angeles, and if the question of ownership of the right to those streams was governed by the laws of Mexico after the conquest until changed by State legislation, and under

such laws (assuming for argument that the title was not vested in the Government of Mexico during its control), the pueblo had a superior right, then the same act would have secured to the city a similar right.

So, no matter how the matter is viewed, the same result obtains that the City has the same right to the waters of the Los Angeles River that its predecessor, the old pueblo, had.

III.

No Federal question is raised under or with respect to the grant contained in the several charters of the city of the waters of the Los Angeles River.

The statutes containing these charters (although the Court would have taken judicial notice of them without their being formally introduced), were admitted in evidence solely for the purpose of showing that the City had succeeded to the rights of the former Pueblo, and not for the purpose of proving that the City had obtained any additional rights (Tr., p. 82).

The City of Los Angeles has never made the preposterous claim that those charters could divest plaintiffs in error or any other riparian owners on the river of any right which they may have had to the waters of that stream, and it does not appear that any decision was ever rendered by the State Supreme Court holding that the charters had such an effect.

On the contrary, it was said in *Vernon Irr. Co. vs. City of Los Angeles*, 106 Cal., 253, that:

"It will hardly be claimed that the legislature could grant to the City the water of the river so as to deprive riparian owners of it."

No one but plaintiffs in error ever did suggest that the city is making such a claim. Such a claim cannot be used as a cloak under which to get into this Court on other questions.

The decision of the State Supreme Court in the case at bar, upon the question of the ownership of the right to use the waters of the river, was based entirely upon the rights vested in the Pueblo under the Spanish and Mexican Laws; though plaintiffs in error do not appear to have raised any question concerning the city's ownership of the river waters under the charters or under the Laws of Spain and Mexico, except to contend that the Pueblo had ceased to exist prior to American occupation, and therefore the city could not have succeeded to the rights of the former Pueblo.

City of Los Angeles vs. Pomeroy, 124 Cal., 641.

Moreover the question, concerning the grant contained in these charters, was not only not raised in the State Court, but is not even specified in the assignments of error in this Court.

IV.

If we admit, however, for the sake of argument, that a Federal question, concerning the effect of the Condemnation Statute in depriving plaintiffs in error of their property without due process of law was properly raised, it is clear that the claim that that statute is repugnant to the Constitution of the United States is unfounded.

The statute is contained in Sections 1237–1263 of the Code of Civil Procedure of California, which went into effect on April 4, 1872, by the provision of Section 1259.

These sections are given in full in an APPENDIX *to this brief.*

The law is a general one, and applies to every person and corporation in the State alike.

By Section 1248 of said Code, the Court or jury are to assess the "value" of the property, and all improvements thereon appertaining to the realty, and, also in case the property constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance and the construction of the improvement proposed by the party seeking to condemn.

The State Constitution (Section 14, Article I.) provides:

"Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into Court for, the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensa-

tion therefor be first made in money or ascertained and paid into Court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a Court of record, as shall be prescribed by law."

By Section 1249, it is provided that,

"for the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the summons, and its actual value, at that date, shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected, * * *"

The Supreme Court, in the prevailing opinion in the case at bar, held that the value referred to in the statute was the market value.

City of Los Angeles vs. Pomeroy, 124 Cal., 647–650.

The Chief Justice, in his dissenting opinion, had intimated, with regard to the contention that the trial Court erred in restricting the value to the date of the summons, that the provision of the statute might have been in conflict with the State Constitution, but held that the point had been waived by the plaintiffs in error by a request for an instruction to the jury that that date was the one on which the appraisement should be made.

The Chief Justice had also declared that, while generally speaking, the market value was the criterion of compensation, yet, in the case at bar, such a basis of valuation was improper, and cited the instance of a gold mine being discovered the day after the commencement of the condemnation proceedings,

thereby giving a value to the land far in excess of that which it had in the estimation of possible purchasers prior to the institution of the suit.

Now, as already remarked, the statute requiring the date of summons to be taken as the time at which the valuation should be made, had been in existence ever since 1872.

The State Supreme Court had, in a number of decisions, sustained the validity of the statute in this respect, under the section of the constitution of 1879, already quoted.

Cal. So. Ry. Co. vs. Kimball, 61 Cal., 90.
Cal. So. Ry. Co. vs. Colton L. & W. Co., 4 Pac. Rep., 414 (reversing s. c., 2 Pac. Rep., 38).
Tehama Co. vs. Bryan, 68 Cal., 57.
San Jose, etc., R. R. Co. vs. Mayne, 83 Cal., 566.

No other rule than market value has ever obtained in California, though the first case that we find, in which the subject is discussed, is *Arcata, etc., R. R. Co. vs. Murphy*, 71 Cal., 122, which was decided in 1886, some ten years before the trial of the case at bar.

The rule was again announced in *San Diego, etc., Co. vs. Neale*, 78 Cal., 63.

As stated in the last cited case, the concensus of the decisions in the United States is in favor of that rule.

Jacksonville, etc., R. R. Co., vs. Walsh, 106 Ill., 255.
Little Rock, etc., Ry. vs. Woodruff, 49 Ark., 388.
Low vs. R. R. Co., 63 N. H., 558.
Searle vs. Lackawanna R. R., 33 Pa. St., 57.
2 Dillon Mun. Corp., Section 487.
Cooley's Const. Lim. (6th Ed.), 692, 697, 699.

As stated in the last work (page 697), "the question is reduced to one of market value." * * * Again, at page 699, the same author says that the value of the land "is to be assessed with reference to *what it is worth for sale.*" * * *

"Actual Value"; "Market Value."

Actual value is the same thing as market value. *Value is the exchange relation of commodities*, and is so defined by lexicographers and economists. The value of a thing in relation to money is the amount of money which can be obtained in exchange for it. This is the market value, and this is the actual value. What a person can make out of a property by *keeping* it himself and spending upon it his labor and money and performing that class of labor which is called by the French economists the work of the *entre-preneur*, or the work of the manager of an industry, does not show the value of the property, but it would show the value of the property *plus the value of the labor and money spent upon it*, and the chief element would be the value of the skill and labor in developing it and not the value of the thing itself. The thing itself is worth *only what it will bring in exchange for money* or for other commodities. This is the market value, and this is the actual value; for, as above stated, value means the exchange relation of commodities.

The constitution and statutes, therefore, require that what shall be ascertained is the actual or market value; that is, the *value at which the property can be exchanged for money.*

In *Lewis on Eminent Domain* (2d Ed.), Section 479, page 1056, after stating what may be shown with re-

gard to the uses to which the property is adapted, it is said, " But, when all the facts and circumstances have been shown, the question at last is, *what is it worth in the market.*"

See, also, Section 478 of the same work, and cases cited.

" The damages to be awarded should be the market value of the property for any purpose for which it is adapted or for which it may be used " (*Mills on Eminent Domain* (2d Ed.), Section 168); see, also, Section 173 of the same work.

The rule is adopted in Iowa, Kansas, Massachusetts, Missouri, Nevada, Pennsylvania, Tennessee, Illinois, Wisconsin and possibly in all the other states.

Section 478, *Lewis on Eminent Domain.*

The same rule is approved by this Court in *Kerr vs. So. Park Com.*, 117 U. S., 379; *Boom Co. vs. Patterson*, 98 U. S., 403, and *Shoemaker vs. United States*, 147 U. S., 282.

As stated by Mr. Justice TEMPLE, who delivered the prevailing opinion in the case at bar (124 Cal., 647-9), market value is the only practical test of actual value, and to say that where discoveries are made, after the date of summons, of new elements of value in land, such matters can be considered in determining the real value before the discovery, is only to postpone the time of valuation—that is, the market value is still to be taken as a criterion of compensation—though fixed at a later date.

The question then really resolves itself into one of date of appraisement, and, as above shown, the plaintiffs in error waived this objection by asking the Court to charge the jury that the date of estimating the value of the property was the date of summons (Tr., p. 622).

The rule promulgated by the Legislature, as construed by the State Supreme Court, was evidently adopted for the purpose of doing justice to the owner of property to be taken for public uses, and was not intended to deny him the right to receive just compensation. In some cases, he might receive more by being allowed the market value than he could get if the intrinsic value (if such a thing can be said to exist with regard to land), were given. For instance, if land, on account of wild speculation, were to have a present saleable value of a certain amount, and proceedings to condemn were instituted at that time, then, if prices should go down to what they were before the rise in values, the owner would be benefited; and other instances might be mentioned.

It is argued in the assignment of errors that the prejudice suffered by plaintiffs in error, by having the jury instructed to find the market value as of the date of the summons, arose from the fact that the character of the land, with regard to the presence of a large body of percolating water, was not well known.

By referring to the exceptions taken at the time of trial in the Superior Court, it will be seen that the plaintiffs in error excepted to this instruction on the ground *that there was no evidence to prove that there was anything discovered after the commencement of the suit showing any new elements of value.*

We quote from exceptions 52 and 53, on page 667 of the transcript of the record:

"The defendants except to the twenty-eighth instruction for the same reason, namely, first, that the market value is taken as a measure of compensation instead of the actual value; and, second, in assuming that there was any information acquired concerning the percolating waters since the date of the issuance

of the summons. The evidence shows that the lands always bore unmistakable evidence of the existence of the waters, and the subsequent development and excavations and investigations have only confirmed that knowledge.

"And they except to that portion of the instruction where the jury are told that, if they believe that said waters did not give said land an additional market value at that day—that is, the date of the issuance of the summons—or that if an additional market value were given, but the same did not equal the real value of said waters, then they must place on said lands a valuation equal only to the market value which they then had, including such additional market value which said waters gave to said lands irrespective of the true value of said waters, for the reason above stated; and for the further reason that there is no evidence to which it is applicable, and is a direction to the jury to speculate upon matters which there is no evidence to justify."

In view of this admission of the plaintiffs in error, it will be unnecessary, we presume, for us to do more than state that the uncontradicted evidence on the trial showed that the presence of underground waters was manifest to the casual observer, it not only being patent from an inspection of the river bottom in which the land in question lies, but the fact was also ascertained by the sinking of a number of wells by the City of Los Angeles prior to the commencement of the suit, and while it held an option from the plaintiffs in error to purchase the same land (Tr., pp. 156, 7).

We refer, however, to some of the places in the transcript of the record, wherein is contained the testimony regarding the character of the land with respect to its apparent water bearing qualities (Tr., pp. 101-2, 161, 169-171, 176, 179, 198-9, 200-1, 205-6, 211, 241, 258-9, 389, 405, 424-5).

The instruction, forbidding the jury to consider acts done since the commencement of the action in esti-

mating the value of the property, had reference to the quantity of underground waters rather than to the fact of such waters being there, two cuts or trenches having been made by plaintiffs in error and numerous wells sunk by both sides after the commencement of the action.

The jury, however, evidently found that all of the water was part of the river, and, therefore, even if it were error to exclude evidence concerning subsequent discoveries in regard to the subterranean water, no prejudice could have been suffered by plaintiffs in error.

The contention of plaintiffs in error in regard to the unconstitutionality of the condemnation statute, so far as relates to the appraisement of the land at its market value and fixing the time of appraisement at the date of the summons, is not based upon the failure of the Legislature to allow any compensation at all, but refers to the mode prescribed by the State in estimating and ascertaining the amount of such compensation.

This is simply an attack on the power of the State to use its judgment and discretion in regulating a matter which is intrusted to it alone to control. If the State Legislature cannot prescribe the rules governing this subject, there is no other authority that can do so.

The Fourteenth Amendment, as held in numerous cases by this Court, was never intended to strip the State Legislature of the power of doing that which is to be done in the regulation of matters over which the States have control.

The principle has been established by this Court that that amendment cannot be deemed to have been

intended to deprive the States of the powers which had been commonly exercised by them without question before its adoption, but was only to prevent the State Legislatures from arbitrarily depriving the citizen of his property in disregard of the rules which had been already established for the protection of private rights. This Court will not permit itself to be made a Court of Appeals to reverse the decisions of State Courts in regard to questions of general justice and equitable considerations in the taking of property.

Fallbrook Irr. Dist. vs. Bradley, 164 U. S., 112.

A series of cases has been decided by this Court with reference to the power of the legislature to levy assessments on land for local improvements, and it has been uniformily held that it is competent for the legislature to prescribe the rules with regard to the apportionment of these assessments, including the offsetting of benefits resulting from the improvement, and that this Court will not intervene where the law is generally uniform in its operation, without any unjust discrimination against particular classes or persons; and that, although the assessment may not be equal in every case, and even where individuals of classes are subjected to burdens far in excess of those sustained by others affected by the improvement, this fact affords no ground for the intervention of this Court where the legislature has exercised its judgment and discretion in good faith with a view of promoting the public interest, and inequality of burdens has resulted from the accidental situation of the party, and from a practical impossibility of being avoided.

Thus, in *Fallbrook Irr. Dist. vs. Bradley*, 164 U. S., 112, it is said (page 157):

"It never was intended that the Court should, as the effect of the Fourteenth Amendment, be transformed into a Court of Appeal, where all decisions of the State Courts, involving merely questions of general justice and equitable considerations in the taking of property, should be submitted to this Court for the purpose of determination. The final jurisdiction of the Courts of the State would thereby be enormously reduced, and a corresponding increase in the jurisdiction of this Court would result, and it would be a great misfortune in each case."

The Court then refers with approval to the declaration in *Davidson vs. New Orleans*, as to when proceedings, authorized by the State for imposing assessments, etc., are valid; and then adds (p. 178):

"The method of assessments, here provided for, *may not be the best which could have been adopted in order to accomplish the most equal and exact justice which the nature of the case permits.* But none the less, we are unable to say that it runs counter to any provision of the Federal Constitution, and we must for that reason hold the objection here stated to be untenable."

So, in *Walston vs. Nevin*, 128 U. S., 578, which involved the Street Improvent Act of Kentucky, it was said:

"The statute has been repeatedly before the Kentucky Court of Appeals, which has sustained it as constitutional and proper legislation, the powers vested thereby in the local government being subject to the supervision of the courts, 'where the particular facts in each case can be examined, and the controversy determined by those rules and principles which have always governed courts in dealing with questions of assessment and taxation' [Citing Kentucky cases]. Unjust, unequal or arbitrary burdens are not authorized to be imposed by the terms of the Act, and opportunity is given to every party interested to be heard in opposition to the enforcement of the liability in the

courts, which are specifically authorized to 'make all corrections, rules and orders to do justice to all parties concerned.' In *Davidson vs. New Orleans*, 96 U. S., 104 (24, 619), it was held by this court, Mr. Justice MILLER delivering the opinion, 'that whenever, by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections. It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case.' And the conclusion was reached that neither the corporate agency by which the work is done, the excessive price which the statute allows therefor, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment is made before the work is done, nor that *the assessment is unequal as regards the benefits conferred*, nor that personal judgments are rendered for the amount assessed, are matters in which the state authorities are controlled by the Federal Constitution. So the determination of the taxing district and the manner of the apportionment are all within the legislative power [citing cases]. And whenever the law operates alike on all persons and property, similarly situated, equal protection cannot be said to be denied" [citing cases].

In *Tonawanda vs. Lyon*, 181 U. S., 289, a street assessment case which went up from the United States Circuit Court, wherein the trial Court held unconstitutional the Statute of New York, allowing assessments on abutting property according to frontage to

pay for grading and paving streets, this Court, reversing, said :

" What was claimed was that a State statute, which directs municipalities to assess the whole expense of paving any highway therein upon the lands abutting upon the highway so improved in proportion to the feet frontage of such lands, without providing for a judicial inquiry into the value of such lands and the benefits actually to accrue to them by the proposed improvements, is unconstitutional and void. And it was held by the Court below that, notwithstanding the Courts of the State may have held otherwise, it was its duty to follow the decision of this Court of *Norwood vs. Baker*, 172 U. S., 269, which was regarded by the Court below as establishing the privilege contended for, and accordingly the defendants were enjoined from enforcing payment of the assessment. * * * *It was not the intention of the Court, in that case, to hold that the general and special taxing systems of the States, however long existing and sustained as valid by their Courts, have been subverted by the Fourteenth Amendment of the Constitution of the United States.* The purpose of that Amendment is to extend to the citizens and residents of the States the same protection against arbitrary State legislation affecting life, liberty and property, as is afforded by the Fifth Amendment against similar legislation by Congress. The case of *Norwood vs. Baker* presented, as the Judge in the Court below in the present case well said, 'considerations of peculiar and extraordinary hardships,' amounting, in the opinion of a majority of the judges of this Court, to actual confiscation of private property to public use, and bringing the case fairly within the reach of the Fourteenth Amendment. *The facts disclosed by the present record do not show any abuse of the law, nor that the burdens imposed on the property of the complainants were other than those imposed upon that of other persons in like circumstances;* * * *."

In *French vs. Barber A. P. Co.*, 181 U. S., 324, the same subject is discussed, and this Court reviews the former decisions with regard to the construction of the provision of the Federal Constitution prohibiting the General Government from taking private property

without due process of law, and shows that generally the same construction would be given to that portion of the Fourteenth Amendment which puts the same limitation on the States.

In *Cass Farm Co. vs. Detroit*, 181 U. S., 396, supporting a law of Michigan authorizing assessments on abutting property for street paving according to the frontage, it was said:

"We have recently held that *it was not the intention of the Fourteenth Amendment to subvert the systems of the States pertaining to general and special taxation;* that that Amendment legitimately operates to extend to the citizens and residents of the United States the same protection against arbitrary State legislation, affecting life, liberty and property, as is afforded by the Fifth Amendment against similar legislation by Congress, *and that the Federal Courts ought not to interfere when what is complained of is the enforcement of the settled laws of the State applicable to all persons in like circumstances and conditions, but only when there is* some abuse of law, amounting to confiscation of property or deprivation of personal rights, as was instanced in the case of *Norwood vs. Baker.*"

In the case at bar, the law attacked is a settled one of the State, applicable to all persons in like circumstances and conditions, and no abuse of that law is shown to have been exercised.

It was incumbent on the Legislature to establish a criterion of value and also to fix a time at which the appraisement should be made, and whether the market value should be the rule of compensation, or whether the date of the commencement of the proceeding should be the one at which the value of the property should be taken, or some other criterion of value or time of valuation, was a matter of legislative judgment and discretion, with which this Court will not interfere.

The question has come up in several cases, determined by this Court, in regard to the time of valuing the property sought to be condemned for public use, and it has been held that the Government, Federal or State, is not obliged to pay the value existing at the date of the trial, but that any additional value which has been given to the property by reason of the projection of the contemplated improvement should be excluded from consideration.

Shoemaker vs. United States, 147 U. S., 282.
Kerr vs. So. Park Com., 117 U. S., 379.

The first of these cases arose under an Act of Congress for the condemnation of land for a park in the District of Columbia, while the second one was under the law of Illinois for the condemnation of land for a park in Chicago, and, *in both cases, the value of the property was put as of the date of the passage of the statute authorizing the condemnation.*

In *May vs. Boston*, 158 Mass., 21 (32 N. E. Rep., 902), it was held that, where land had been taken from the owner for a park, and it was afterwards sought to take additional land from the same owner, he could not show the value which had attached after the first taking, but was restricted to the value which obtained prior to the definite planning of the park.

In *Burt vs. Merchants' Ins. Co.*, 115 Mass. 1, it was said, in holding that the time for valuing land, taken by the United States for a post-office, was the date of the commencement of proceedings:

"But the compensation, to be paid by the Government and received by the owners of the land, must be estimated according to the value of the land at the time of the filing of the petition. This affords a definite and invariable rule, which has relation to the time at

which the property is designated and set apart for the public use, the owners ascertained who are entitled to be compensated, and the judicial proceedings instituted for the purpose of determining such compensation, and is not liable to be affected by the duration of the proceedings, or by the increase or diminution in value, whether occasioned by the taking itself or by acts of the owners, lapse of time or other circumstances. In all these respects it is a juster measure of compensation than a valuation of the estate at any subsequent point of time."

The Court refers to the opinion in *Parks vs. Boston*, 15 Pick., 198, in which was illustrated the principle of compensation for roads, payment being required as of the date of location, when the right vests in the public, by saying that

" if a *pie poudre* court could be called on the instant and on the spot, the true rule of justice for the public would be to pay when they took, and this rule is departed from, because some delay is necessary, which delay is compensated for by interest."

Besides Massachusetts and Illinois, the date of commencing proceedings is fixed, as the time at which the compensation should be estimated, in Arkansas, Missouri, Nebraska, Oregon and Utah, and probably in other States.

Lewis on Eminent Domain (2nd Ed.) § 477, page 1043.

It is patent, then, that it is at least a question whether the date of the commencement of the proceedings should be taken as the time at which the valuation should be made or whether the value as of some subsequent date should be allowed; in other words, it is the establishment of a rule of law upon a subject which the State is entitled to regulate, and requires the exercise of judgment and discretion, which cannot be

interfered with where the Legislature proceeds in good faith and without any intention of acting unjustly towards any one.

The Condemnation Statute of California, although, in terms, the title of the owner is not divested until the payment of compensation, can yet be considered as an appropriation of the property to public uses at the time of the commencement of the proceedings.

It is competent for the Legislature to take property for public use before compensation is made to the owner, provided that a reasonably safe mode of collecting the value is assured to the owner; and this extends to the case of actually taking possession of the property in advance of payment.

Kerr vs. So. Park Com., 117 U. S., 379, *supra.*
Sweet vs. Rachel, 159 U. S., 380.
Cooley's Const. Lim. (6th Ed.), 692.
2 Dillon Munc. Corp. (4th Ed.), Section 615, page 720.

Under the California statute the owner is assured of compensation by the retention, not only of the title, but of possession, until payment, so that no question can arise with regard to the certainty of his receiving compensation.

THE USE of the property, pending proceedings, is sufficient and full compensation to the owner during that time, and, therefore, it was not obligatory on the Legislature, as a matter of justice (for there is no rule of law requiring it), to allow interest from the time at which the valuation was to have been made. It is true that the owner is prevented from improving during the time that the condemnation proceedings are hanging over him, but it does not necessarily follow that he

would have improved his property had an attempt not been made to condemn it. There was no effort made in the case at bar to show that any damage was occasioned by the inability of the owner to improve or to make some other use of the property than was being made at the time proceedings were begun. In fact it appeared that the land was entirely unimproved, nor was it shown that it could have been improved in any way, to produce a greater revenue than was being obtained at the time that the summons was issued.

INTEREST is not allowable at common law, and therefore it is necessary for its allowance that it should have been provided for by statute. There is no presumption that any property would have earned an income equivalent to the prevailing or any other rate of interest, and common experience teaches the contrary in an infinity of cases.

In *Shoemaker vs. United States*, 147 U. S., 282, *supra*, this Court held that interest, between the commencement of proceedings and the payment of money into court, could not be allowed, as the owner had had the possession and use of the property, and any inconvenience to which he was subjected by being unable to improve, was presumed to be considered in fixing the compensation.

This case was approved in *Bauman vs. Ross*, 167 U. S., 598.

See, also, Mills on Eminent Domain, Section 175.

Section 280, Randolph on Eminent Domain.

Donnelly vs. Brooklyn, 121 N. Y., 9 (24 N. E. Rep., 17).

Stewart vs. County, 2 Pa. St., 340.

Hilton vs. St. Louis, 99 Mo., 199 (12 S. W. Rep., 657).

In *So. Park Com. vs. Dunlevy*, 91 Ill., 49, in answer to the claim that the owner should be allowed interest from the time of the filing of the petition, it was said:

"The defendants had the right to the possession and use of their property after the petition was filed the same as before, and we perceive no reason why they should have the use of the property, and, at the same time, be allowed interest upon its value, before it was actually taken."

If there was any loss sustained by plaintiffs in error in not being allowed interest, it was a damage which resulted from the inability to give exact and even compensation in all cases, resulting from a general rule, which, on the whole, works justly; and, moreover, as above remarked, it was not shown that they were prevented from making any use of the property which would have gained a greater profit than that which was received during the pendency of the proceedings.

Now, if the statute had provided, as it was competent that it should have provided, that the title to the land in question should vest upon the filing of the petition, the effect would have been to have created an involuntary (so far as the owners were concerned) sale of the property at its then market value, and the transaction would have to be treated the same as if plaintiffs in error had agreed to convey the land to the city at the market price.

There is no more reason for holding that the owner would be entitled to receive an additional increase of price, resulting from subsequent discoveries or changes in the relative situation of the property, than where a deed of conveyance had been made and the market price actually paid therewith. Even in the supposed case of the discovery of a gold mine (and there is no

pretense here that any gold mine or other element of value was subsequently found), the case would not have been different.

When the city filed its petition to condemn, it impliedly proposed to purchase the land at the then market value, and it did not offer or bind itself to pay more than that price. It is not claimed, in the case at bar, that the selling value of the land, either with or without the water, ever advanced a dollar during the proceedings for condemnation, but the only contention is that plaintiffs in error were entitled to have the alleged percolating waters valued apart from and independent of the land.

No evidence was introduced on behalf of plaintiffs in error concerning the market value, at any time, of the land *as water bearing land*, but evidence was given for the purpose of showing how much water could be developed, the cost of such development, and the price at which such water could be sold after being developed.

To show the separate value of the water would be to prove a speculative value, which is not competent.

Lewis on Eminent Domain (2d Ed.), Sections 479–480.

Searle vs. Lackawanna, etc., R. R., 33 Pa. St., 57.

Reading, etc., R. R. vs. Baltheser, 119 *Id.*, 472.

Texas, etc., R. R. vs. Matthews, 60 Texas, 215.

The only advantage which plaintiffs in error claim would have resulted to them from the presence of so-called "percolating waters" in their land, was their power to have diverted the water there and conveyed

it elsewhere for purposes of sale beyond the water shed of the stream.

That this could not have been done has been determined by the Supreme Court of this State in the recent case of *Katz vs. Walkinshaw*, 70 Pac. Rep., 663, *supra*, following the New York cases of *Smith vs. Brooklyn*, 160 N. Y., 357 (affirming 46 N. Y. Suppl., 141), and *Forbell vs. New York*, 164 N. Y., 522.

It is not claimed in the case at bar that no compensation was allowed, or that full compensation, upon the basis of adaptation of the land to every purpose for which it could have been used, excepting that of developing and removing the underground waters, has not been received by plaintiffs in error. On the contrary, one of their own witnesses valued the property taken at $20,000, and the damage to the remaining portion at $2,000, making an aggregate appraisement of $3,000 less than was awarded by the jury (Tr., p. 223).

The amount of damages having thus been fixed under rules prescribed by the Legislature, applicable to all persons and corporations alike, and intended to afford just and ample compensation to the owner of property taken for public uses, and generally adapted to that end, this Court will not hold the statute or proceedings as repugnant to the fourteenth amendment.

This principle was declared in *Chicago, etc., Ry. vs. Chicago*, 166 U. S., 226, which was in error to the Supreme Court of Illinois, and involved a judgment of that court sustaining the proceedings in a suit brought to condemn the land of a railroad company for a street, and wherein one dollar was awarded as damages for the taking.

This Court, in sustaining the judgment of the State Court, said :

" Even if we were of opinion in view of the evidence that the jury erred in finding that no property right, of substantial value in money, had been taken from the railroad company, by reason of the opening of a street across its right of way, we cannot, on that ground, re-examine the final judgment of the State Court. We are permitted only to inquire whether the trial Court prescribed any rule of law for the guidance of the jury that was in *absolute disregard of the company's right to just compensation.* We say, " in absolute disregard of the company's right to just compensation," **because we do not wish to be understood as holding that every order or ruling of the State Court in a case like this may be reviewed here, notwithstanding our jurisdiction, for some purposes, is beyond question. Many matters may occur in the progress of such cases that do not necessarily involve, in any substantial sense, the Federal right alleged to have been denied ; and in respect of such matters, that which is done or omitted to be done by the State Court may constitute only error in the administration of the law under which the proceedings were instituted."**

Here the Court cites *Lent vs. Tillson,* 140 U. S., 316, to the effect that Federal questions were not presented by the claim that it was not expedient to widen the street, or that the supervisors should not have so declared, or that the commissioners did not properly apportion the costs or estimate the benefits, or that the commissioners' incidental expenses were too large, or that a larger amount of bonds were issued than necessary if the excess was not so great as to indicate a gross departure from the requirements of the statute, and says :

" In harmony with those views, we may say in the present case that the State Court, having jurisdiction

of the subject matter and of the parties, and being under a duty to guard and protect the constitutional right here asserted, the final judgment ought not to be held to be in violation of the due process of law enjoined by the Fourteenth Amendment, unless by its rulings upon questions of law the company was *prevented from obtaining substantially any compensation.*"

In *Backus vs. Fort, etc., R. R.*, 169 U.S., 557, this language, in regard to the necessity of there being a total disregard of compensation, is quoted with approval. There having been made to plaintiffs in error a substantial (and, in fact, a princely) allowance for their land, this Court will not look into the evidence and rulings of the State Courts to ascertain whether a greater amount might not have been allowed under the facts proven.

V.

If, however, it were to be admitted, for the sake of the argument, that the question of the right of the city to the waters of the Los Angeles River is a Federal question, and that the validity of this right, under the Federal Constitution, laws and treaties of the United States, was raised and decided in the State Courts, which we deny, then our proposition is that this right of the city is well established under Spanish, Mexican and California law, and the decisions of the California Supreme Court, and that those decisions are correct and do not deprive the plaintiffs in error of their property without due process of law, or deny them the equal protection of the law.

We maintain, as above stated in this brief *(supra*, Point II.), that the question of the right of the city to the waters of the Los Angeles River is a question depending solely upon the laws of Spain, Mexico and California, and does not depend upon any treaty or act of Congress, and, therefore, that this question is not at all a Federal question. But, if this Court shall be of opinion that this is a Federal question, then we respectfully refer this Court to the decisions of the Supreme Court of California, cited and referred to in this brief under Point II., to wit, *Lux vs. Haggin*, 69 Cal., 255 ; *Felis vs. City of Los Angeles*, 58 Cal., 73 ; *Vernon Irr. Co. vs. City of Los Angeles*, 106 Cal., 237, and

City of Los Angeles vs. Pomeroy (the present case), 124 Cal., 597, and to the argument in this brief *(supra,* Point II.) to show that on the merits the City of Los Angeles has a paramount right to the waters of the Los Angeles River as fully as was held by the California Supreme Court in the present case.

VI.

If it were to be admitted, for the sake of argument, that the question of underground waters is a Federal question, and was raised and decided by the State Courts, both of which we deny, still our proposition is that that question was rightly decided by the State Courts. The claims of the plaintiffs in error as to underground waters are novel and unfounded.

Plaintiffs in error are the first discoverers, not of the fact that there were subterranean waters flowing beneath the surface bed of the Los Angeles River, but of the idea that such water did not form a part of the stream and was capable of being diverted without affecting the surface river.

The evidence showed, without conflict, that the surface river flowed along a channel formed in pervious material, composed of sand, gravel and boulders, which had to be thoroughly saturated with water before the surface stream could exist.

In other words, the surface water was the surplus of the water which had moved underground until it

reached the land sought to be condemned, and which, by reason of the insufficiency of the voids of the underground material to accommodate the whole flow, was forced to the surface.

It is a self-evident proposition that any water withdrawn from underground would take away the necessity of a similar quantity rising to the surface, and, therefore, any water thus abstracted would, *pro tanto*, diminish the surface stream of the river. It is a perversion of the term to style the waters passing through this pervious material as " percolating."

The evidence showed that the saturated plane beneath the surface of the ground, at the point where the river ran, and extending northerly in the direction of the mountains, was on a hydraulic grade line, as uniform as a surface stream, resulting from the backing up of the underground flow, thus showing that the waters were confined within a circumscribed channel, and moving in a certain direction with a velocity estimated at from 9 to 14 miles per annum (Tr., pp. 209, 415, 416).

The river, in passing through the two miles of length of the land sought to be condemned, increases about 126 per cent. or from about 1,000 to 2,300 inches (Tr., p. 273).

As testified to by the witnesses, the surface river channel was a natural cut in the saturated plane, just as the two trenches, constructed by plaintiffs in error, were artificial cuts or gashes in the same plane (Tr., p. 422).

The river is the life blood, so to speak, of a city of some 150,000 inhabitants, and has been used by that

city or its predecessor, the Spanish Pueblo, for over 120 years.

The plaintiffs in error really proved the case of the city, for their evidence showed conclusively that, as defined by the instructions of the trial Court (which were all approved on appeal), the underground waters in the land sought to be condemned, constituted a subterranean stream or water course, which, by reason of its intimate contact with the surface stream of the Los Angeles River, was a part of it.

This is shown by the statement in specification 24 of the assignment of errors in this Court (Tr., pp. 815-817), wherein it is substantially stated that, under the instructions of the trial Court, the jury were bound to find that the underground water was a part of the Los Angeles River; and the same claim is made in the brief of plaintiffs in error at pages 186-8.

But for the earnestness of counsel for plaintiffs in error in maintaining what we cannot but regard as preposterous claims with regard to the character of such waters and their value, we would not deem the subject worthy of serious argument.

There is just about as much reason for the contention that the waters flowing underground through these lands gave them the fabulous value which is attempted to be put on them as for the claim made on the trial (but now abandoned) that the value of the power created by the fall of the surface stream of the river during its two miles course through the lands in question ran up into the hundreds of thousands of dollars.

It appears from the evidence that, notwithstanding the ready sale for water in this part of the State, no more attempt has been made to utilize the hidden

treasure which is claimed to exist on the land of plaintiffs in error than has been made with regard to the generation of this valuable water power, nor has any beneficial use ever been made of the land except to raise a little barley on a small part of it; and some of the witnesses for the city placed the value of the property as low as $5,000 (Tr., p. 283).

As soon, however, as the City of Los Angeles, in its efforts to construct its own waterworks, selected the land as a site for headworks, visions of these immense values seemed to fill the heads of plaintiffs in error, and things which were formerly not considered worth using became a veritable Klondyke. The city would have had the same experience undoubtedly had it attempted to construct its headworks on any point in the river, for the stream, after leaving the land of plaintiffs in error until it crosses the upper city boundary for a distance of about six miles, flows through a sandy bed and consists of surface and subterranean waters, the latter extending far into the sides and filling the voids in the underground material of the whole river bottom, so that every owner of the lands over which the stream flowed could contend with equal force that these waters were of such a character as to be distinguished from the other water of the river and subject to appropriation by any one who could legally gain access to them.

THE MAP marked "Defendants' Exhibit F" in the portfolio of maps shows the situation of the two tracts described in the complaint, and the topography thereof; and, from this, it will be seen that the land extends a distance of about two miles in a general direction of east and west in the river bottom, the

northerly line being substantially the high bluff which marks the limits of the river bottom on that side, except at one point where a very small piece of land above this bluff is taken.

The tract, at its widest part, is about half a mile in width, and at its narrowest about 850 feet; but the river bottom proper at the latter point is only about 350 feet across.

Both tracts, which form one compact parcel, contain an aggregate area of about 315 acres.

This is divided into the following classes:

237 acres low, sandy river bottom, covered with willows and subject to overflow from the river.

12 acres channel of surface stream.

48½ acres mesa or bench land not subject now to overflow.

18 acres hilly land skirting the river bottom on south side (Tr., pp. 284, 345–6).

The mesa or bench land is 25 to 30 feet higher than the river, and is composed of the same material as the river bottom, excepting that it has some soil on the top, consisting of a sandy mould, and the gravel beneath is somewhat coarser (Tr., pp. 103–4).

But this bench land was also originally covered by the river, and is formed by deposits made by it and by the wash from the adjoining hills (Tr., pp. 103–4).

The city proposes to construct a tunnel throughout the whole length of the land, with other intersecting tunnels, for the purpose of diverting the water underground, so as to obtain it in a purer form; and, according to the testimony of witnesses for the city, the surface flow will either be taken by these tunnels or

will be lowered beneath the bed so as to pass off underground in the river below (Tr., pp. 100-2).

(*See* MAP *annexed to complaint at transcript pp.* 36-7).

It appears from the evidence that this is the mode in which the water company, which was engaged in supplying the city with water under contract at the trial, took its water in 1896 from the river at a point several miles below (Tr., pp. 248-250, 260).

For the purpose of ascertaining the location of the water plane below the surface and to demonstrate the apparent movement of that water, numerous wells were bored by both parties, and two long cuts, hereinbefore mentioned, were made by plaintiffs in error, commencing at the surface and gradually deepening until at the upper end of the lower one (which is 1,600 feet long), the depth is 10 feet, and at the western end of the upper cut (which is 600 feet long), the depth is 12 feet (Tr., p. 401). Both cuts are in the river bottom, the upper one being also in the wash of the Tujunga creek, an affluent of the river (Tr., p. 401). Down this last wash flowed a surface stream of 137 inches, which emptied into the river near the upper cut (Tr., p. 404).

In order to demonstrate theoretically that there was a large amount of underground water in the lands in question, plaintiffs in error introduced testimony of various engineering experts to show the amount of water which came from the rainfall in the San Fernando basin, at the outlet of which is located the property of plaintiffs in error; and these witnesses agreed that the total subterranean flow, exclusive of the surface stream of the Los Angeles river, amounted to somewhat over 19,000 inches.

Mr. Friel gives 19,210 inches (Tr., p. 402).

Mr. Newman's estimate is 19,300 inches (Tr., p. 202).

Mr. Finkle says the amount is 19,995.4 inches (Tr., p. 214).

Mr. Taylor thinks that 19,210 inches is the correct flow (Tr., p. 379).

Each of these witnesses testifies that a large proportion varying from one-half to two-thirds of this flow passes through the lands of plaintiffs in error (Tr., pp. 379, 214, 206, 402).

The City's witnesses testified that this underground flow amounted to only between 2,000 and 2,700 inches.

Mr. Eaton says 2,100 inches (Tr., p. 229).

Mr. Purcell puts it at 2,500 or 2,600 inches (Tr., pp. 269, 270).

Mr. Koebig's calculation gives 2,700 inches (Tr., p. 548).

Mr. Schuyler gives 2,000 to 2,100 inches (Tr., p. 572).

Witnesses for plaintiffs in error agreed in their estimate of the velocity of the underground flow of 14 to 17 miles per annum, which would be from about 7 to 10 feet per hour (Tr., pp. 209, 415, 416, *et passim*). This velocity was calculated at the cuts (Tr., pp. 431–2); but all of the witnesses agreed that the movement of the water at these cuts was greatly accelerated beyond that which the underground waters at other confined places would have.

They also fixed on the proportion of voids in the material, through which the underground waters flowed, at one-third, or, in other words, they say that one-third of all this material is water and two-thirds sand, gravel, boulders and unconnected masses of clay (Tr., pp. 387, 415, 416, *et passim*).

The greatest depth at which water was obtained was

123 feet in a well bored on the south side of the river, water being encountered at five feet from the surface; but no considerable amount was found below 89 feet (Tr., pp. 189–190).

This well is at the head of the 1,600 foot cut, about eight or ten feet above the level of the river (Tr. p. 190).

Bedrock was struck here at 193 feet (Tr., p. 190).

Across the gap or mouth of the valley on the east end of the land in question, from the base of the Cahuenga Hills to that of the Verdugo, is a distance of about one and a half miles to two miles, but no evidence was given with regard to the inclination or depth of the bedrock under this space, nor how far the underground waters extended easterly toward the Verdugo Hills.

The other wells extended across the lands sought to be condemned, from south to north, and for a considerable distance on the high land north of the bluff which bounds the river bottom, but none of them, except one near the first, went below the plane of saturation (Tr., pp. 189–191, 499–508).

Wherever borings were made on and near the *locus in quo* (excepting in the two wells which were sunk beyond the depth of 123 feet), all of the material below the surface of the water plane was found to be saturated (Tr., pp. 258-9).

All the expert witnesses substantially agree in their opinion concerning the location of the saturated plane, based upon the borings which were made, and upon the profiles which show this plane and which are made exhibits in this case.

(See Plaintiff's Exhibits 15, 16, 17, 18 and 19, and Defendants' Profile Exhibits, in portfolio.)

They also agree in their opinion as to the manner in which the water moves in the land in question. Their theory is that the waters, coming down from a higher elevation north of the bluff which bounds the low river bottom, strike the base of the Cahuenga Hills, which, in places, also form the lower side of the same river bottom, and, being stopped there by some impervious material, are forced to rise and back up again towards the north to a certain elevation in order to get a sufficient head to force themselves through the material to the east.

Testimony of *Friel*, Tr., pp. 170–1, 431–2.
Testimony of *Newman*, Tr., p. 203.
Testimony of *Taylor*, Tr., p. 379.
Testimony of *Finkle*, Tr., p. 362.
Testimony of *Eaton*, Tr., pp. 228–9, 238–9.
Testimony of *Purcell*, Tr., pp. 270–1.
Testimony of *Koebig*, Tr., pp. 549–550.
Testimony of *Schuyler*, Tr., pp. 586–8.

This back water extends northerly for a distance of about 1,500 to 1,700 feet at the lower part of the land (Tr., p. 432).

The surface of the saturated plane presents a substantially uniform hydraulic grade-line, and all of the underground waters on the land in question are *under pressure* and in *close contact* together and with the surface stream of the river, and moving in the same general direction with this surface flow (Tr., p. 180).

(Also see Defendants' Exhibits Profiles and Plaintiff's Exhibits 15–19).

The surface flow at the point where the river enters the land of plaintiffs in error amounts to 1,146 inches, and at the east end to 2,059 inches, there being taken out between the two points in the main supply ditch

of the city an additional 532 inches, showing that the surface stream had gained 1,445 inches in passing through the land of plaintiffs in error, or 126 per cent. (Tr., p. 273).

The various witnesses described the manner in which the water came into the river and also into the cuts, and the trial Judge and jury viewed the premises during the progress of the trial.

WE GIVE A BRIEF STATEMENT OF THE TESTIMONY OF OUR WITNESSES (WHO WERE ALL ENGINEERS), IN REGARD TO THE NATURE OF THE UNDERGROUND AND SURFACE FLOW.

Mr. Eaton says that the waters come down the washes of the Big Tujunga and other creeks in the San Fernando basin, and, flowing underground through the channels made by the surface stream of these creeks, in a westerly direction at first, suddenly deflect and turn to the south, following the washes as indicated on the maps (Defendants' Exhibit G and Plaintiff's Exhibit 14), until they reach the land sought to be condemned, when they strike the Cahuenga Mountain, causing them in part to rise under pressure and form the Los Angeles River and in part to flow easterly along the general course of the surface stream (Tr., pp. 228–9, 239, 240).

He says that streams can be seen pouring from the banks into the river and bubbling up from the bottom (Tr., pp. 232–241).

There is a direct connection between the water flowing on the surface of the river and that moving underground, and it is all a solid body of water (Tr., p. 234).

All of the waters, surface and subterranean, are necessary to maintain the river, and, without the

underflow, there would be no surface flow, as the channel is only a sandy bed (Tr., pp. 233–4).

The water is all in contact, and if one drains any of the land beneath, the river would drop down to fill the voids (Tr., p. 234).

The water flows into the two cuts made by plaintiffs in error in the same manner as into the river (Tr., pp. 241–2).

Mr. Purcell described the flow of the underground waters as coming out of the Big Tujunga and other cañons to the northwest of the lands in question, and, taking a southwesterly direction, they follow the natural washes from those cañons formed by the floods and which had been filled in with débris and become underground channels, down to the Cahuenga Hills, and, in order to get head to acquire a velocity sufficient to discharge through the material of the ground to the east, rise in part to the surface, forming the surface flow of the Los Angeles River, and the balance passes away down the river bottom in the same general direction as the surface stream and in contact therewith (Tr., pp. 271–2).

He says that any diversion of the underground waters on the land of plaintiffs in error would result in diminishing the flow of the river, to the same amount, as the surface stream is supported by the water below (Tr., p. 270).

Mr. Koebig also gives the sources of the waters on the land in question as being the waters of the underground channels of the cañon washes flowing down until they reach the Cahuenga Mountain, where they

are checked by material answering the purpose of a dam (Tr., p. 545).

He likens the body of water on the lands in question to a reservoir, mixed with gravel, sand and boulders, and says that the surface stream of the river is simply water pouring over the top of this subterranean reservoir (Tr., p. 549).

It will be noted that Mr. Friel (a witness of plaintiffs in error) compares the channels of the river to a gate in the slope of the water plane (Tr., p. 170).

In *Mr. Koebig's* opinion the surface stream is a part of the underground water beneath and is supported by it, without which support the river would disappear; and that, if any of this underflow were to be taken out, the effect would be to decrease the flow in the river below to the amount so taken out (Tr., pp. 549, 550).

Mr. Schuyler's account of the manner in which the waters find their way to the land of plaintiffs in error in the river bottom is substantially the same.

He describes the formation of the underground channels from the mouths of the cañons, and the manner in which the water moves down through them to the river (Tr., pp. 587–8).

He says that the Tujunga wash, which covers the whole length of the land sought to be condemned, is really the main branch of the Los Angeles River, and that the flow from this wash, striking the impervious material which exists on the southern line of the land of the plaintiffs in error, makes for itself a head and rises so as to force its way along; and if the water plane so formed is cut, the water, having a direct

outlet, is in no need of rising to force itself eastward; and for this reason, if the underground water were taken out, the river would be lowered, as the water would not rise to reach the necessary level (Tr., pp. 527–8).

It is impossible to make a diversion of the underflow without diminishing the surface water, and if a tunnel is run 30 feet below the saturated plane, it will absorb the river (Tr., p. 572).

The underflow has a direct connection with the surface stream and supports it, and it is impossible to take out any of it and not affect the river, unless an impervious bottom is made beneath it, as it is all one stream (Tr., pp. 573, 586–7).

The river runs first on the surface and then underground, and then rises again to the surface, in the valley above this land (Tr., p. 574).

The witnesses of plaintiffs in error, while they were very careful to call the underground flow "percolating waters" (except when making a slip of the tongue), still describe their character so as to show that there was in fact a subterranean stream flowing in a defined channel and having a uniform direction, easily traced on the ground by the surface indications; and, in denying that there was an underground stream, they merely assert what, in the same breath, they admit to be contrary to the facts.

Some amusing illustrations are found in the testimony where these witnesses are questioned concerning the character of conduits, having sides and bottom and partly filled with coarse material through which the water freely moves, and their uniform definition of

such a flow is that it simply constitutes percolating water! (Tr., pp. 207–8 *et passim*).

But they do testify to the following facts:

Mr. Friel says that the water bubbled up in the cuts (Tr., p. 176).

To avoid affecting the river in running a tunnel under it, it would be necessary to make the tunnel water-tight for a distance of 300 feet on each side of the river; and if the tunnel were at a depth of 30 feet, the water plane would be affected for 700 feet on each side (Tr., p. 407).

A large proportion of the water on the lands of plaintiffs in error comes from the Tujunga wash (Tr., p. 416).

The river is a big cut in the water plane just like the cuts made by plaintiffs in error (Tr., p. 422).

If you lower the saturated plane, you lower what the river depends on for its existence (Tr., p. 422).

You cannot tell the effect of taking out the underground waters on the river below (Tr., p. 422).

Mr. Newman says that the water flows into the cuts and comes in streams (Tr., pp. 203–5, 211).

He determined that there was underground water on the lands in question from the topography of the country and the examination of the Los Angeles River in the river bottom (Tr., p. 205).

The underground water flows in the same general course as the river (Tr., p. 209).

The water of the river has all been in this underground plane, and if the water were removed from below, the river would sink (Tr., p. 211).

Mr. Taylor says that the waters moving underground through the land of plaintiffs in error furnish the supply, in part, for the river below (Tr., p. 384).

His reason for supposing that the underground flow is not a running stream, is that it does not move as fast as the surface stream of the river (Tr., p. 385).

The underflow feeds the river and supports it to some extent (Tr., pp. 385–6).

Mr. Sanders states that the water comes into the river the same as into the cuts, except that one cannot see so well in the river on account of the growth of willows, etc. (Tr., p. 389).

It would be necessary to make the tunnel water-tight for several hundred feet on each side of the river to keep from drawing from it (Tr., p. 390).

He describes the work called the Pirtle cut, which consisted of a trench run in the sand and gravel about a mile above the land in question along the Tujunga wash, and says that there was a surface stream of 75 inches running there when work began, which was increased in a short while to over 500 inches (Tr., pp. 390–1; see, also, Tr., pp. 436–7).

He admits that the movement of the water through the lands in question constitutes a flow (Tr., p. 391).

The Pirtle cut is a draft on the same water plane that would supply a similar one on the land of plaintiffs in error (Tr., p. 391).

The Pirtle development indicated a natural flow and freer outlet than at any other portion of the valley, and was rendered possible at the shallow depth by the underlying impervious stratum coming nearer to the surface, and may have been caused by the wash being lower than the surrounding country (Tr., pp. 392–3).

The surface flow of the river depends for its existence on the water under it, and if the water plane did not come up to the river, the stream would dry up (Tr., p. 395).

As good a flow of water could not be obtained north of the bluff as in the river bottom (Tr., p. 395).

On the slope of the San Fernando valley, the water comes down in layers and spreads out wider, but when it comes into the lower levels it becomes a deep current (Tr., pp. 395-6).

He designates the space east of the Cahuenga hills through which the water runs, as the channel (Tr., p. 396).

He says that the water came into the Pirtle cut in a number of small streams, some flowing as much as three or four inches, and that there is no difference in the manner in which the water comes into the cuts on the land of plaintiffs in error and into the Pirtle cut (Tr., pp. 396, 398).

All of the subterranean water in the land in question has the same general trend (Tr., p. 400).

Mr. Pirtle, who made the cut which bears his name, says that the water came into it in small streams the size of a finger, and that the water ran freer and flowed when passing through the gravel (Tr., pp. 439, 440).

It was important for plaintiffs in error to show that there was a great deal more underground water in their lands than flowed in the surface streams of the Los Angeles River, and the testimony of their witnesses, claiming an underground flow of 19,000 inches, was to support this proposition.

Of course, all of this testimony was theoretical, and it was for the jury to determine whether or not the fact was proven ; and they did determine in the negative.

The City's witnesses testified as positively, based upon the theory which they enunciated, that the total

amount of subterranean flow was not more than sufficient to account for the surface stream of the river and a small underflow necessary to sustain the surface flow at a point below the land in question.

But nature was very kind to the City, and provided a natural weir by which the total amount of underflow could be approximately measured.

On the river, several miles below the land in controversy, at a point called the "Narrows," the hills approach close together so that the comparatively short distance of only about 3,500 feet intervenes between bedrock on each side (Tr., p. 230; see, also, Plaintiff's Exhibit 26 in portfolio).

The saturated plane here averages in depth about 44 feet, and the cross-section would contain an area of about 155,000 square feet.

The greatest velocity at either of the cuts on the land in question was only about 10 feet an hour (the velocity at one being only 7 feet an hour), and the lower of the cuts yielded a flow of 120 inches.

The total average area of the saturated sides and bottom of this cut amounted to about 24,000 square inches, and through this area flowed 120 inches giving 1-200 of an inch per square foot.

As testified by the witnesses of plaintiffs in error themselves, this velocity is probably greater than that of the water in the ground below where no openings have been made.

There would then be passing through the lower cross section at the "Narrows," at the most, a total flow of 770 inches.

Mr. Eaton, the City's witnesses, however, figured the amount at 400 or 500 inches (Tr., pp., 231–2); and although he thinks the estimate ridiculously small, yet the facts bear him out.

Mr. Koebig, another of the City's expert witnesses, gives the estimate at not less than 300 nor more than 700 inches, assuming a cross section of 176,000 square feet, which is more than the section contains. He takes as his basis the discharge from the river, which occupies an area of 11 acres or 480,000 square feet. He, however, assumed that this discharge was only 1,000 inches, whereas we have shown it to be 1,445 inches. The percentage of discharge from the river bed, without counting the banks would give 1-333 of an inch per square foot, which would considerably reduce the 770 inches obtained by allowing 1-200 of an inch of water per square foot.

None of the witnesses for plaintiffs in error attempt to explain away this lower cross-section except Mr. Finkle, who, rather than abandon his beautifully-worked-out theory of 19,000 inches of underground waters, concluded that the portion which did not flow through the "Narrows" had dropped through a hole on the way down stream! (Tr., p. 622).

It will be observed, however, that, even if this remarkable phenomenon actually occurs, yet, if any water is taken out from beneath the surface on the lands sought to be condemned, the flow of the Los Angeles River at the "Narrows" will be reduced *pro tanto*, and, therefore, the position of the plaintiffs in error that they would not interfere with the surface stream of the river by taking out the subterranean waters (supposing that 19,000 inches existed) is untenable.

The measurements of the surface waters of the river show that the estimates of the city's witnesses in regard to the quantity of the underground waters were probably as correct as is possible with theoretical calculation.

The river flowed 2,059 inches at the east end of the land of plaintiffs in error (Tr., p. 273), and the amount flowing at the "Narrows" was 2,830 inches (Tr., p. 244), making a total gain of 771 inches between the two points.

The water company diverted 1,246 inches (Tr., p. 244), making a total of 2,017 inches, in addition to the surface stream flowing on the land of the defendants, and therefore coming from an underground source.

In addition to this, was the amount of underflow at the "Narrows," estimated at from 300 to 800 inches, but this would be counterbalanced by the subterranean supply coming from the Verdugo watershed, estimated at about 750 inches (Tr., p. 248).

Eaton's estimate of the underflow is 2,100 inches (Tr., p. 229). *Purcell's* is 2,500 inches (Tr., pp. 269, 270). *Koebig's* is 2,700 inches (Tr., pp. 548-9); and *Schuyler's* is 2,000 inches (Tr., p. 572).

That the estimate of underground flow is apt to be greatly exaggerated is illustrated by the example given by the witness Eaton, where a costly dam was constructed in the mouth of a cañon in the San Fernando basin out of which a surface stream of 17 inches flowed, and the total amount of subterranean water was found to be only one and one-half inches (Tr., p. 252).

The total surface flow of the river as far down as the "Narrows," as ascertained by diversions made by

the city and the water company and measurements taken at that point, is about 4,074 inches (Tr., p. 260).

The fact that the water stands higher in the adjoining ground than in the river or in the cuts, is dwelt on strongly in the brief for plaintiffs in error, as showing that they are different waters; but we fail to see how the water could rise in an open channel any more than it does after it leaves the stand pipe of an artesian well.

SUCH BEING THE STATE OF FACTS WITH REGARD TO THE UNDERGROUND WATERS, WHAT IS THE LAW APPLICABLE TO THEIR OWNERSHIP?

None of the cases decided in California have ever gone to the extent of distinguishing a surface from a subterranean stream, or holding that the retarded or accelerated movement of underground waters determined their character with regard to being an underground stream, protected by the law governing surface streams; nor is there any case which intimates that the fact, that an underground stream is obstructed by the material in which it moves, prevents such subterranean water from being considered a watercourse. Were such a rule to be adopted in this State, there would hardly be a possibility, especially in Southern California, of the existence of any except surface watercourses.

In the Eastern States and in other parts of the Union, especially where there is a limestone formation, it is often, and possibly almost invariably, the case that underground streams are found moving in the cavities of the earth as free from obstructions as a

water pipe ; but, in the southern part of this State, it is very rare that these unobstructed underground channels exist, and subterranean streams are almost always found working their way through a channel, filled up, as is the case with the river bed on the land in question, with sand, gravel, boulders and other permeable materials.

So far from maintaining the doctrine contended for by counsel for plaintiffs in error, the State Supreme Court has, in several cases, decided to the contrary.

Even in the case of that class of percolating waters which do not constitute a watercourse, there was authority prior to the decision of the case to the point, that the owner of the soil cannot cut them off if they directly enter into and form part of a surface stream, to the use of which another has acquired a right ; and even supposing that the rule of common law, as it existed in England, where the climatic and geological conditions are different from those existing in this State, was as is claimed, it would be modified to suit our situation.

The earliest leading case is *Hanson vs. McCue*, 42 Cal., 303.

The Court below in that case did not find that the water, which was accumulated by the defendant's ditch, was part of any stream. The presumption, therefore, was that it was not a stream. The Supreme Court said that there was nothing in the record to overcome this presumption. The only fact appearing in the findings was that the ditch would intercept the " hidden and subterranean veins, streams and sources of said spring," and the Court held that this was nothing more than a finding that the defendant was about to divert

waters percolating and "filtrating" in his own soil. The water in question was a spring, having no outlet, and there was nothing to show that there ever was or had been anything like a surface stream or any appearances indicating a watercourse.

In *Cross vs. Kitts*, 69 Cal., 217, the question of the right to percolating water again arose, and the Court approved the statement in *Roath vs. Driscoll*, 20 Conn., 540, that "water, whether moving or motionless *in the earth*, is not, in the eye of the law, distinct from the earth," to which the owner has an absolute right. But the thing decided in the case was that where one has acquired the title to a running stream of water which had been produced by collecting the percolations in the earth by means of a tunnel situated in the land of another, the person in whose land the tunnel is situated has no right to cut off the supply by excavations in his soil. This is directly contrary to the doctrine quoted, and in conflict with *Hanson vs. McCue* and the cases which it follows. It is proper to say, however, that the case is not clear, and that it is by no means certain that the Court meant to decide anything more than that, as the person who owned the water right had bought it of the landowner after the tunnel was made, he had a right to have the tunnel remain as it was as a collector of the percolating water, and could enjoin the land owner from destroying it.

In *Painter vs. Pasadena L. and W. Co.*, 91 Cal., 82, the doctrine of *Hanson vs. McCue* is approved, but the

case did not involve the question, and it was referred to only by way of discussion.

In *Southern P. R. R. Co. vs. Dufour*, 95 Cal., 616, the case of *Hanson vs. McCue* is again approved. But in this case the Court below found as a fact that the spring in controversy was fed solely by percolating water, and it did not appear from the evidence that there was any stream flowing on the surface. The chief point decided was that the statute authorizing the appropriation of water had no application to springs. The question of what is required to constitute an underground stream of water did not arise, and was not discussed.

In *Gould vs. Eaton*, 111 Cal., 639, the case of *Hanson vs. McCue*, is again approved, but the rule is restated in a somewhat modified form thus:

"The water which is *held by the soil* is a portion of the soil itself, and belongs to the owner of the land as fully as any other ingredient of the land. This rule is not changed by the character of the material through which the water percolates, whether it be loose sand, or a more compact sandstone. So long as the water is in a condition of filtration or percolation, it is a part of the soil and subject to the sole dominion of the proprietor of the land in which it is found."

This case was decided upon the finding and conclusion of the Court below, and the inference implied thereby, that the water was merely percolating, and the language above quoted is *obiter dictum*. It was held that if two opposite inferences might be deduced from the facts found, the Supreme Court must hold to that one which was in harmony with the judgment of the Court below, and was not at liberty to make the

inconsistent inference and thereupon reverse the judgment.

It is, however, also said in the same case:

"So long as it [the water] is within the sandstone, although the lower part of the stratum may be more highly charged with the water than the upper part, it merely percolates through the sandstone until it is free of the outcropping of the stratum where it borders upon the stream";

in other words, the water was moving *by gravity and not under pressure, in confined limits,* as is the case in this suit.

The case of *Bartlett vs. O'Connor*, 36 Pac. Rep., 513, is in support of the rights to the use of running streams formed by water coming from a swamp, as against the owner of the soil who attempts to cut off the supply.

That water may be a part of a watercourse, although it is found percolating through sand, was in effect decided in the case of *Vernon Irrigation Co.vs. City of Los Angeles*, 106 Cal., 237. In that case the facts as found by the Court below were that the city, by means of certain levees, caused the water percolating through and in the sands beneath the bed of the Los Angeles River to rise to the surface and flow as a surface stream in the otherwise dry bed of the river through and over the plaintiff's land. The Court below had held that this water was an artificial stream, being formed of water not belonging to the river as a watercourse, and that the city, therefore, owned the water and might sell it outright, or put it to use on non-riparian lands outside its limits.

The Supreme Court reversed the case on this point,

among others, holding that the newly flowing water was part of the stream, and saying (at page 253), with regard to the claim that it was "developed" water, that "this would be to save water, not to develop it."

Hale vs. McLea, 53 Cal., 583, had sustained the doctrine that underground water moving in a certain direction with confined limits formed a water course.

The decision in the case at bar was followed in the subsequent case of *Vineland Irr. Dist. vs. Azusa Irr. Co.*, 126 Cal., 486.

A good distinction between subterranean watercourses and strictly percolating waters without defined courses or channels is given in the case of *Strait vs. Brown*, 16 Nev., 317. Says the Court:

"No distinction exists in the law between waters running under the surface in defined channels and those running in distinct channels upon the surface. The distinction is made between all waters *running in distinct channels*, and whether upon the surface or subterranean, and those *oozing or percolating through the soil in varying quantities and uncertain directions.*'

Bruening vs. Dorr, 47 Pac. Rep., 290, is a Colorado case very similar to *Strait vs. Brown*, 16 Nev., 317, *supra*, in which *S. P. R. R. Co. vs. Dufour*, 95 Cal., 615, is reviewed.

Cole S. M. Co. vs. V. & G. H. W. Co., 1 Sawyer, 470, also upholds the rights of persons entitled to use waters supplied from a subterranean source.

The cases of *Burroughs vs. Saterlee*, 67 Iowa, 396, *Hebron G. R. Co.*, 90 Ind., 192, and *Keeney vs. Carrillo*, 2 New Mexico, 480, recognize the principle that underground water does not have to be unmixed with other substances in order to be a watercourse.

In *Meyer vs. Tacoma L. & W. Co.*, 35 Pac. Rep., 601, cited by plaintiffs in error that there was no

proof given in regard to the nature of the subterranean water to connect it with the channel of the creek which it was claimed to be a part of, and the Court declined to hold that the entire valley constituted the bed of the stream.

It is said in that case that, if it had been shown by the proofs that the water all remained upon the surface until it arrived at a definite point, and then all disappeared, the conclusion might follow that it still retained its position as a stream, but there was nothing to indicate where or how, within the boundaries of the valley, the flow was continued.

There was nothing to show that the water was under any pressure, or that it formed a solid body in connection with any water moving under the channel of the stream, or was anything except water merely working its way down from the sloping slides by gravity and without any hydraulic grade line.

In the case of *Wheatley vs. Baugh*, 25 Pa. St., 528, much relied on by the advocates of the percolating water theory, it was declared, in effect, that when filtrations are gathered together in sufficient volume to have an appreciable value, and to flow in a clearly defined channel, they lose the character of ordinary percolating water which the owner of the soil may interfere with in improving his property.

Another much cited case *Delhi vs. Youmans*, 50 Barb., 316, decided on appeal in 45 N. Y., 362, recognizes the doctrine that water moving under ground in restricted channels constitutes streams governed by the same laws as are those flowing above ground, and also that the owner of land can cut off percolating water only by acts done for the benefit of that land.

In *Kinney on Irrigation*, Section 48, it is laid down,

with citation of authorities, that in order that the channel of a subterranean watercourse be defined within the requirement of the law, it is sufficient if there is a contracted and bounded channel, though the course of the underground stream may be *undefined by human knowledge*, and that the term "known" refers to knowledge of the course of the stream by *reasonable inference*. In Section 49 of the same work it is said that percolating waters are those which pass beneath the surface *without definite channels;* and that the reason for the rule of law, which gives these waters to the owner of the soil, is that as percolations spread themselves in every direction through the earth, it is impossible to avoid disturbing them without relinquishing the necessary enjoyment of the land.

In *27 Am. & Eng. Ency. of Law*, page 423 (1st Ed.), substantially this same definition is given, referring to Section 281 of Gould on Waters (2d Ed.). At page 424 of the same work it is stated there is no distinction between subterranean and surface waters if the former are well defined and constitute a regular stream.

In *Sadler vs. Lee*, 66 Ga. 45, it was held that where subterranean water emerges and afterwards sinks and re-emerges, if its entire exact course can be traced, the owner of riparian land below will be protected against the diversion of the water above.

In the case at bar, the waters were all in contact, filling all the voids of the material in which they were contained, and, therefore, necessarily within confined limits, for such pressure could not exist unless something held the water and prevented it from moving in the direction in which it gravitated naturally. Here the dyke formed by the Cahuenga hills, according to the admitted testimony of all of the witnesses, consti-

tuted an impervious bank which forced the water to extend up in an opposite direction until a sufficient head was obtained to force it through the subterranean channel to the east. The bottom of the saturated plane, having a slope which inclined to the Cahuenga hills, constituted one side of the channel, just as much as would the bottom of a flume, composed of a vertical board fastened to another having a slope sufficient to bring its outer edge on a level with that of the vertical one.

There is no rule of law or reason which requires that a subterranean watercourse shall be composed of any regularly formed channel; and the expert witnesses for plaintiffs in error seemed to be of the opinion that unless such a channel formed practically a covered drain with cemented sides and bottom, completely unobstructed, it could not be a watercourse.

In the case at bar the space through which the water moves is a limited one and the conditions are entirely different from those which prevail in the other parts of the valley or basin. Notwithstanding the contention of counsel for plaintiffs in error that there was no difference in the flow of the water through the whole basin, it appeared that the few wells which had been sunk at different points, at a distance from the land in question, had been bored to the depth of as much as 197 feet without getting a supply of water; and one of these wells is 449 feet deep (Tr., pp. 200,411).

It appeared from their own testimony that it was only a limited area, located in the vicinity of the river bottom and in the line of the Tujunga wash, in which water could be obtained by so-called development through the means of trenches or tunnels, and that

there was a strip about five miles wide covering the eastern end of the basin that was composed of nearly pure sand and altogether different from the rest of the valley (Tr., pp. 176, 394–6, 410–411, 414–415).

We refer to the authorities cited in the opinion of the Chief Justice in the case at bar (124 Cal., pp. 632–6).

VII.

For the reasons set forth in the foregoing brief and in the further brief on behalf of the City of Los Angeles, filed by W. B. Mathews, City Attorney of Los Angeles, and others, the writ of error in this case should be dismissed for want of any federal question; or, if there is federal jurisdiction, the federal questions were rightly decided, and the judgment should be affirmed, with costs.

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APPENDIX CONTAINING THE CHAPTER OF THE CODE OF CIVIL PROCEDURE RELATING TO EMINENT DOMAIN.

TITLE VII.

Of Eminent Domain.

1237. "*Eminent Domain*" *defined.*

Sec. 1237. Eminent domain is the right of the people or government to take private property for public use. This right may be exercised in the manner provided in this title.

1238. *Eminent domain may be exercised, on behalf of what uses.*

1238. Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:

1. Fortifications, magazines, arsenals, navy yards, navy and army stations, lighthouses, range and beacon lights, coast surveys, and all other public uses authorized by the Government of the United States.

2. Public buildings and grounds for the use of the State.

3. Public buildings and grounds for the use of any county, incorporated city, or city and county, village, town, or school districts; canals, aqueducts, reservoirs, tunnels, flumes, ditches, or pipes for conducting or storing water for the use of the inhabitants of any county, incorporated city, or city and county, village, or town, or for draining any county, incorporated city, or city and county, village, or town; raising the banks of streams, removing obstructions therefrom, and widening and deepening or straightening their channels; roads, streets, and alleys, and all other public uses for the benefit of any county, incorporated city, or city and county, village, or town, or the inhabitants thereof, which may be authorized by the Legislature; but the mode of apportioning and collecting the costs of such

improvements shall be such as may be provided in the statutes by which the same may be authorized.

4. Wharves, docks, piers, chutes, booms, ferries, bridges, toll-roads, by-roads, plank and turnpike roads; steam, electric and horse railroads; canals, ditches, dams, pondings, flumes, aqueducts, and pipes, for irrigation, public transportation, supplying mines and farming neighborhoods with water, and draining and reclaiming lands, and for floating logs and lumber on streams not navigable.

5. Roads, tunnels, ditches, flumes, pipes, and dumping places for working mines; also, outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter from mines; also, an occupancy in common by the owners or possessors of different mines of any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines.

6. By-roads leading from highways to residences, farms, mines, mills, factories, and buildings for operating machinery, or necessary to reach any property used for public purposes.

7. Telegraph lines.

8. Sewerage of any incorporated city, or city and county, or of any village or town, whether incorporated or unincorporated, or of any settlement consisting of not less than ten families, or of any public buildings belonging to the State, or to any college or university.

9. Roads for transportation by traction engines or road locomotives.

10. Oil pipe-lines.

11. Roads for logging or lumbering purposes.

12. Canals, reservoirs, dams, ditches, flumes, aqueducts and pipes, for supplying and storing water for the operation of machinery for the purpose of generating and transmitting electricity for the supplying of mines, quarries, railroads, tramways, mills, and factories with electrical power, and also for the supplying electricity to light or heat mines, quarries, mills, factories, incorporated cities, cities and counties, villages or towns, together with lands, buildings, and all other improvements in or upon which to erect, install, place, use, or operate machinery for the purpose of generating and transmitting electricity for any of the purposes or uses above set forth.

13. Electric light lines.

(Amendments 1895, page 89). Approved March 26, 1895.

1239. *Estates and rights subject to condemnation.*

Sec. 1239. The following is a classification of the estates and rights in lands subject to be taken for public use:

1. A fee-simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams, and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine;

2. An easement, when taken for any other use;

3. The right of entry upon and occupation of lands, and the right to take therefrom such earth, gravel, stones, trees, and timber as may be necessary for some public use.

(Amendment, approved March 24, 1874. Amendments 1873-74, 355); took effect July 1, 1874.

1240. *"Private property" defined.*

Sec. 1240. The private property which may be taken under this title includes:

1. All real property belonging to any person;

2. Lands belonging to this state, or to any county, incorporated city, or city and county, village, or town, not appropriated to some public use;

3. Property appropriated to public use; but such property shall not be taken unless for a more necessary public use than that to which it has been already appropriated;

4. Franchises for toll-roads, toll-bridges, and ferries, and all other franchises; but such franchises shall not be taken unless for free highways, railroads, or other more necessary public use;

5. All rights of way for any and all the purposes mentioned in section twelve hundred and thirty-eight, and any and all structures and improvements thereon, and the lands held or used in connection therewith, shall be subject to be connected with, crossed, or intersected by any other right of way or improvements or structures thereon. They shall also be subject to a limited use, in common with the owner thereof, when necessary; but such uses, crossings, intersections, and connections shall be made in manner most compatible with the greatest public benefit and least private injury;

6. All classes of private property not enumerated may be taken for public use, when such taking is authorized by law.

1241. *Facts necessary to be found by court before condemnation.*

SEC. 1241. Before property can be taken, it must appear:

1. That the use to which it is to be applied is a use authorized by law;

2. That the taking is necessary to such use;

3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use.

1242. *Parties may make location.*

SEC. 1242. In all cases where land is required for public use, the state, or its agents in charge of such use, may survey and locate the same; but it must be located in the manner which will be most compatible with the greatest public good and the least private injury, and subject to the provisions of section twelve hundred and forty-seven. The state, or its agents in charge of such public use, may enter upon the land and make examinations, surveys, and maps thereof, and such entry shall constitute no cause of action in favor of the owners of the land, except for injuries resulting from negligence, wantonness, or malice.

1243. *Jurisdiction in superior court.*

SEC. 1243. All proceedings under this title must be brought in the superior court of the county in which the property is situated. They must be commenced by filing a complaint and issuing a summons thereon.

(Amendment, approved April 26, 1880; Amendments 1880, 118 (Ban. ed, 515); took effect immediately.)

1244. *The Complaint and its contents.*

Sec. 1244. The Complaint must contain:

1. The name of the Corporation, Association, Commission, or person in charge of the public use for which the property is sought, who must be styled plaintiff;

2. The names of all owners and claimants of the property, if known, or a statement that they are unknown, who must be styled defendants;

3. A statement of the right of the plaintiff;

4. If a right of way be sought, the complaint must show the location, general route, and termini, and must be accompanied with a map thereof, so far as the same is involved in the action or proceeding;

5. A description of each piece of land sought to be taken, and whether the same includes the whole or only part of an entire parcel or tract. All parcels lying in the County, and required for the same public use, may be included in the same or separate proceedings, at the option of the plaintiff, but the Court may consolidate or separate them to suit the convenience of parties.

When application for the condemnation of a right of way for the purposes of sewerage is made on behalf of a settlement or of an incorporated village or town, the Board of Supervisors of the County may be named as plaintiff.

(Amendment, approved April 26th, 1880; amendments 1880, 118 (Ban. ed. 515): took effect immediately).

1245. *Summons, what to contain.*

SEC. 1245. The clerk must issue a summons which must contain the names of the parties, the general description of the whole property, a statement of the public use for which it is sought, and a reference to the complaint for descriptions of the respective parcels, and a notice to the defendants to appear and show cause why the property described should not be condemned as prayed for in the complaint. In all other particulars it must be in the form of a summons in civil actions, and must be served in like manner.

1246. *Who may defend—what the answer may show.*

SEC. 1246. All persons in occupation of, or having or claiming an interest in any of the property described in the complaint, or in the damages for the taking thereof, though not named, may appear, plead, and defend, each in respect to his own property or interest, or that claimed by him, in like manner as if named in the complaint.

1247. *Court to have jurisdiction to regulate mode of making crossings or of enjoying a common use.*

SEC. 1247. The Court shall have power:

1. To regulate and determine the place and manner of making connections and crossings, or of enjoying the common use mentioned in the fifth subdivision of Sec. 1240:

2. To hear and determine all adverse or conflicting claims to the property sought to be condemned, and to the damages therefor;

3. To determine the respective rights of different parties seeking condemnation of the same property.

1248. *Court or Jury to assess damages.*

SEC. 1248. The Court, jury, or referee must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

1. The value of the property sought to be condemned, and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein; if it consists of different parcels, the value of each parcel and each estate or interest therein shall be separately assessed.

2. If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will acrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff.

3. Separately, how much the portion not sought to be condemned, and each estate or interest therein, will be benefited, if at all, by the construction of the improvement proposed by the plaintiff; and if the benefit shall be equal to the damages assessed under Subdivision Two, the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefit shall be less than the damages so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value.

4. If the property sought to be condemned be water or the use of water, belonging to riparian owners, or appurtenant to any lands, how much the lands of the riparian owner, or the land to which the property sought to be condemned is appurtenant, will be benefited, if at all, by a diversion of water from its natural course, by the construction and maintenance by the person or corporation in whose favor the right of eminent domain is exercised, of works for the distribution and convenient delivery of water upon said lands; and such benefit, if any, shall be deducted from any damages awarded the owner of such property.

5. If the property sought to be condemned be for a

railroad, the cost of good and sufficient fences along the line of such railroad, and the cost of cattle guards where fences may cross the line of such railroad.

6. As far as practicable, compensation must be assessed for each source of damages separately.

SEC. 2. This act shall take effect from and after its passage.

(Approved March 19, 1889.)

1249. *Date with respect to which compensation shall be assessed, and measure thereof.*

SEC. 1249. For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the summons, and its actual value, at that date, shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected, in all cases where such damages are allowed, as provided in Section Twelve Hundred and Forty-eight. If an order be made letting the plaintiff into possession, as provided in Section Twelve Hundred and Fifty-four, the compensation and damages awarded shall draw lawful interest from the date of such order. No improvements put upon the property, subsequent to the date of the service of summons, shall be included in the assessment of compensation or damages.

1250. *New proceedings to cure defective title.*

SEC. 1250. If the title attempted to be acquired is found to be defective from any cause, the plaintiff may again institute proceedings to acquire the same, as in this title prescribed.

1251. *Payment of damages, or deposit of bond therefor.*

SEC. 1251. The plaintiff must within thirty days after final judgment, pay the sum of money assessed; but may, at the time of or before payment, elect to build the fences and cattle guards; and if he so elect, shall execute to the defendant a bond, with sureties to be approved by the Court in double the assessed cost of the same, to build such fences and cattle guards within eighteen months from the time the railroad is built on the land taken, and if such bond be given, need not pay the cost of such fences and cattle guards. In an action on such bond the plaintiff may recover reasonable attorney's fees.

1252. *Damages, to whom paid.*

SEC. 1252. Payment may be made to the defendants entitled thereto, or the money may be deposited in court for the defendants and be distributed to those entitled thereto. If the money be not so paid or deposited, the defendants may have execution as in civil cases; and if the money cannot be made on execution, the Court, upon a showing to that effect, must set aside and annul the entire proceedings, and restore possession of the property to the defendant, if possession has been taken by the plaintiff.

1253. *Final order of condemnation, what to contain.*

SEC. 1253. When payments have been made and the bond given, if the plaintiff elects to give one, as required by the last two sections, the Court must make a final order of condemnation, which must describe the property condemned and the purposes of such condemnation. A copy of the order must be filed in the office of the recorder of the County, and thereupon the property described therein shall vest in the plaintiff for the purposes therein specified.

1254. *Putting plaintiff in possession.*

SEC. 1254. At any time after trial and judgment entered or pending an appeal from the judgment to the Supreme Court, whenever the plaintiff shall have paid into Court, for the defendant, the full amount of the judgment, and such further sum as may be required by the Court as a fund to pay any further damages and costs that may be recovered in said proceeding, as well as all damages that may be sustained by the defendant, if, for any cause, the property shall not be finally taken for public use, the Superior Court, in which the proceeding was tried may, upon notice of not less than ten days, authorize the plaintiff, if already in possession, to continue therein, and if not, then to take possession of and use the property during the pendency of and until the final conclusion of the litigation, and may, if necessary, stay all actions and proceedings against the plaintiff on account thereof. The defendant, who is entitled to the money paid into Court for him upon any judgment, shall be entitled to demand and receive the same at any time thereafter upon obtaining an order therefor from the Court. It shall be the duty of the Court, or a judge thereof, upon application being made by such defendant, to or-

der and direct that the money so paid into Court for him be delivered to him upon his filing a satisfaction of the judgment, or upon his filing a receipt therefor, and an abandonment of all defences to the action or proceeding, except as to the amount of damages that he may be entitled to in the event that a new trial shall be granted. A payment to a defendant, as aforesaid, shall be held to be an abandonment by such defendant of all defences interposed by him, excepting his claim for greater compensation. In ascertaining the amount to be paid into Court, the Court shall take care that the same be sufficient and adequate. The payment of the money into Court, as hereinbefore provided for, shall not discharge the plaintiff from liability to keep the said fund full and without diminution ; but such money shall be and remain, as to all accidents, defalcations, or other contingencies (as between the parties to the proceedings), at the risk of the plaintiff, and shall so remain until the amount of the compensation or damages is finally settled by judicial determination, and until the Court awards the money, or such part thereof as shall be determined upon, to the defendant and until he is authorized or required by rule of Court to take it. If, for any reason, the money shall at any time be lost, or otherwise abstracted or withdrawn, through no fault of the defendant, the Court shall require the plaintiff to make and keep the sum good at all times until the litigation is finally brought to an end, and until paid over or made payable to the defendant by order of Court, as above provided, and until such time or times the County Clerk shall be deemed to be the custodian of the money, and shall be liable to the plaintiff upon his official bond for the same, or any part thereof, in case it be for any reason lost or otherwise abstracted or withdrawn. The Court may order the money to be deposited in the State Treasury, and in such case it shall be the duty of the State Treasurer to receive all such moneys, duly receipt for, and safely keep the same in a special fund, to be entered on his books as a condemnation fund for such purpose, and for such duty he shall be liable to the plaintiff upon his official bond. The State Treasurer shall pay out such money so deposited in such manner and at such times as the Court or a Judge thereof may, by order or decree, direct. In all cases where a new trial has been granted upon the application of the defendant,

and he has failed upon such trial to obtain greater compensation than was allowed him upon the first trial, the costs of such new trial shall be taxed against him.

(Amendment, approved April 26, 1880; amendments 1880, 119 (Ban. Ed. 515); took effect immediately).

1255. *Costs may be allowed—distribution thereof.*

SEC. 1255. Costs may be allowed or not, and if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the Court.

1256. *Rules of practice.*

SEC. 1256. Except as otherwise provided in this title, the provisions of part two of this Code are applicable to and constitute the rules of practice in the proceedings mentioned in this title.

1257. *New trials and appeals.*

Sec. 1257. The provisions of Part Two of this Code, relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this title, apply to the proceedings mentioned in this title; provided, that upon the payment of the sum of money assessed, and upon the execution of the bond to build the fences and cattle guards, as provided in section Twelve hundred and Fifty-one, the plaintiff shall be entitled to enter into, improve, and hold possession of the property sought to be condemned (if not already in possession) as provided in Section Twelve Hundred and Fifty-four, and devote the same to the public use in question; and no motion for new trial or appeal shall, after such payment and filing of such bond as aforesaid, in any manner retard the contemplated improvement. Any money which shall have been deposited, as provided in section Twelve Hundred and Fifty-four, may be applied to the payment of the money assessed and the remainder, if any there be, shall be returned to the plaintiff.

(Amendment, approved April 1, 1878; amendments 1877–8, 109; took effect from passage).

1258. *When title takes effect, and construction of.*

Sec. 1258. With relation to the acts passed at the present session of the legislature, this title must be construed in the same manner as if this Code had been passed on the last day of this session, and from and after the time this Code takes effect, all laws of this State in relation to the taking of private property for public uses are abolished, and all proceedings had in the exercise of the powers of eminent domain must conform to the provisions of this title.

1259. *When title takes effect.*

Sec. 1259. Title Seven of part III. of the Code of Civil Procedure of the State of California (This Title) shall be in force and effect from and after the fourth day of April, eighteen hundred and seventy-two.

1260. *Construction.*

Sec. 1260. From and after the time this title takes effect, it must be construed in the same manner as it would be were sections four and seventeen of this Code in force and effect.

1261. *Pending proceedings not affected.*

Sec. 1261. No proceeding to enforce the right of eminent domain commenced before this title takes effect is affected by the provisions of this title.

1262. *Rules of practice.*

Sec. 1262. Until the first day of January, eighteen hundred and seventy-three, at twelve o'clock noon, the provisions of sections twelve hundred and fifty-six and twelve hundred and fifty-seven of this title are suspended, and until then, except as otherwise provided in this title, the rules of pleading and practice in civil actions now in force in this State are applicable to the proceedings mentioned in this title, and constitute the rules of pleading and practice therein.

1263. *Exceptions.*

Sec. 1263 Nothing in this Code must be construed to abrogate or repeal any statute providing for the taking of property in any City or Town for street purposes.

In the Supreme Court of the United States.

JOHN D. HOOKER and A. E. POMEROY, Plaintiffs in Error, vs. THE CITY OF LOS ANGELES, Defendant in Error.	No. 149.

SEPARATE BRIEF FOR DEFENDANT IN ERROR, ON THE QUESTION OF JURISDICTION, IN ANSWER TO THE OPENING BRIEF OF THE PLAINTIFFS IN ERROR FILED IN THIS CAUSE.

Counsel for plaintiffs in error, in anticipation of an objection to the jurisdiction of the Court over this cause on the ground that no Federal question is involved, have made an argument in support of the

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NOTE. We purposely confine this separate brief to a consideration of the question of federal jurisdiction, since if the views on this subject presented in this brief and in that of associate counsel, in which we concur, are sound, it results in a dismissal of this case for want of such jurisdiction. If upon consideration this Court finds that it has jurisdiction to review the judgment of the Supreme Court of California, we respectfully refer the Court to the brief of associate counsel on the merits, whose views and discussion have our full concurrence.

The references in this brief are to the "folios" or "side pagings" of the printed record.

Court's jurisdiction, and have set out what they claim to be the *Federal Questions* presented by the record. These are, substantially, as follows (Brief, pages 75 and 76):

1. The decision of the State Court against the validity of the claim set up in the answer of the plaintiffs in error to the rights of a riparian owner, and to the ownership of alleged percolating waters in lands claimed to be derived from a patent of the United States, as well as from confirmed Mexican grants.

2. Do the statutes of the State of California, prescribing the proceedings for the condemnation of private property, which were construed in this case to authorize the trial of the title of property in condemnation proceedings, and to authorize the determination of the compensation to be paid before such title is determined, provide for the taking of private property for public use without just compensation in violation of the Fourteenth Amendment to the Constitution of the United States?

3. Do the statutes of the State of California, which declare that the City of Los Angeles is vested with a paramount and absolute right to the surface and subterranean waters of the Los Angeles River, deprive the plaintiffs in error of their property without due process of law, in violation of the Fourteenth Amendment?

4. Did the proceedings in this case result in taking the property of the plaintiffs in error, without just compensation?

WE SUBMIT THAT THIS COURT HAS NO JURISDICTION OF THE WRIT OF ERROR FOR THE REASON THAT THE RECORD DOES NOT SHOW THAT A FEDERAL QUESTION WAS PRESENTED TO THE SUPREME COURT OF THE STATE OF CALIFORNIA FOR DECISION, OR THAT THE DECISION OF A FEDERAL QUESTION WAS NECESSARY TO THE DETERMINATION OF THIS CAUSE, OR THAT A FEDERAL QUESTION WAS ACTUALLY DECIDED.

I.

The first question set out by counsel, and claimed by them to give this Court jurisdiction, relates to the decision of the State Court against the claims made by plaintiffs in error to riparian rights, and to the ownership of certain subterranean waters.

The defendant in error, in its complaint, alleged that the Los Angeles River is a non-navigable stream, which rises in the County of Los Angeles, a few miles to the north and northwest of the City of Los Angeles and is fed by streams which rise to the surface in or near the bed of the river; that the bed of the river, from its source to the northern boundary of the city, is composed of sandy soil, into which the waters sink readily and form subterranean streams flowing in well-defined channels beneath such bed, and rising to the surface and becoming a part of the surface water of said river before reaching said city. And that said river flows through the lands sought to be condemned before reaching said city (Tr., fols. 15, 16): That the City of Los

Angeles is the owner in fee-simple of the exclusive right to the use of all of the waters of said river from its source to the southern boundary of said city, in trust for the public purposes of supplying the inhabitants of said city with water for domestic uses and of supplying water for the irrigation of the irrigable lands embraced in the pueblo lands of said city, and for other municipal uses : That the plaintiffs in error are the owners in fee-simple of said lands, subject to the rights of the defendant in error, to the waters of the Los Angeles River. And the prayer of the complaint is for condemnation in fee-simple of all the estate, right, title and interest of said plaintiffs in error in said lands (Tr., fol. 22).

The answer of the plaintiffs in error denies that the Los Angeles River is fed by springs, which rise to the surface in or adjoining the bed of said river ; admits that said bed, from its source to the northern boundary of the city, is, for a considerable portion thereof, composed of sandy soil, but denies that the waters of said stream sinking into the sands, or any portion of the bed, forms well defined subterranean streams, flowing in well defined, or any, channels beneath said bed, or that such subterranean waters rise in any places before reaching the city, or become a part of the surface water of said river ; and denies that the defendant in error is the owner in fee simple, or in any estate, of any right to the use of all the waters of said river, either in trust for the purposes mentioned in the complaint, or for any uses or purposes whatsoever ; and denies that said City of Los Angeles has any right in the said waters, or to the use thereof, other than as a riparian owner of lands through which the river flows, and rights acquired by appropriation ;

and denies that such rights have vested in said city or that it owns the right to the use of the waters of the said river to the exclusion of the plaintiffs in error. On the contrary, the answer alleges that the lands of the plaintiffs in error are riparian to the river, and are situated far above the north boundary of the city, and that, as riparian owners, the plaintiffs in error are entitled to the use of the waters of said river for all lawful purposes, and to a reasonable extent for irrigating said lands and for domestic and other uses. And it is further averred in the answer that a part of the said lands owned by plaintiffs in error was, in the year 1843, granted by the Governor of both Californias to Vincente de la Ossa, and that the remainder of said land owned by them was granted in 1784 to Julio Berdugo and others; that the successors in interest of Ossa and Bergudo petitioned for confirmation of their claims to said lands to the Board of Land Commissioners appointed under an Act of Congress of the United States for the settlement of land titles in the State of California; that said Board of Commissioners rendered decrees confirming said grants, and that said decrees were afterwards affirmed by the District Court of the United States for the Southern District of California; and thereupon patents were duly issued to the successors in interest of said Ossa and Berdugo, and that plaintiffs in error claim title to their lands "under and through the aforesaid Mexican and Spanish grants and the proceedings for the confirmation thereof, and the said patents issued by the United States founded thereon;" and that as owners of said lands the plaintiffs in error are also the owners of all of the waters percolating in the soil thereof, and are also riparian owners having the rights of riparian pro-

prietors in said waters of the Los Angeles River (Tr., fols. 26, 39).

Upon the foregoing issues the Court decided that the defendant in error is, and ever since its organization has been the owner in fee simple of the paramount right to the use of all of the waters of the Los Angeles River, from its source to the southern boundary of said city, so far as may be needed, from time to time, for the public purposes of supplying the inhabitants of said city with water for public and domestic purposes, described in the complaint. And that the plaintiffs in error have, subject to the said rights of defendant in error, the rights of riparian proprietors of the lands sought to be condemned, and the riparian right to use the water of said river for all purposes for which riparian proprietors are entitled to use such waters, and that the allegations in the answer of the plaintiffs in error concerning the title to the lands sought to be condemned, and the sources of that title, are true. And that the plaintiffs in error are the owners of the lands sought to be condemned, and that they derived their title thereto in the manner alleged in their answer, and that, as owners of said lands, they have the rights of riparian proprietors to the use of the waters of the Los Angeles River, subject to the rights of the defendant in error to the use thereof (Tr., fol. 58).

It thus appears that the title asserted by the plaintiffs in error to the lands involved in this controversy is derived from Spanish and Mexican grants, made prior to the conquest, and that the patents of the United States to those lands were issued in confirmation of such grants. So that the question as to the title or right of the plaintiffs in error in these

lands was one of State law, and of general public law, upon which the decision of the State Court is not reviewable here. The laws of California under Spanish and Mexican rule remain, and will remain in force as part of "the unwritten law of the State" until they are changed by the new sovereign.

"The laws of a conquered or ceded country remain "in force until altered by the new sovereign."
Mitchel vs. United States, 9 Pet., 711, 749.

"A cession of territory is never understood to be a "cession of the property belonging to its inhab- "itants. The King cedes that only which belonged "to him. Lands he had previously granted were "not his to cede. Neither party could so understand "the cession."
United States vs. Percheman, 7 Pet., 51, 87.

"It is a general rule of public law, recognized and "acted upon by the United States, that whenever "political jurisdiction and legislative power over any "territory are transferred from one nation or sovereign "to another, the municipal laws of the country, that "is, laws which are intended for the protection of "private rights, continue in force until abrogated or "changed by the new government or sovereign. By "the cession public property passes from one govern- "ment to the other, but private property remains as "before, and with it those municipal laws which are "designed to secure its peaceful use and enjoyment. "As a matter of course, all laws, ordinances, and "regulations in conflict with the political character, "institutions, and constitution of the new government "are at once displaced. Thus, upon a cession of "political jurisdiction and legislative power—and the "latter is involved in the former—to the United "States, the laws of the country in support of an "established religion, or abridging the freedom "of the press, or authorizing cruel and "unusual punishments, and the like, would at "once cease to be of obligatory force without any "declaration to that effect; and the laws of the country "on other subjects would necessarily be superseded by "existing laws of the new government upon the same

" matters. But with respect to other laws affecting the " possession, use and transfer of property, and de- " signed to secure good order and peace in the com- " munity, and promote its health and prosperity, " which are strictly of a municipal character, the rule " is general that a change of Government leaves them " in force until, by direct action of the new Govern- " ment, they are altered or repealed (*American Insur- " ance Co. vs. Canter*, 1 Pet., 542; *Halleck, Interna- " tional Law*, Ch. 34, Sec. 14."

Chicago & Pacific Railway Co. vs. McGlinn, 114 U. S., 542, 546.

The conquest of the territory of California did not affect the character of the interests of the inhabitants in lands derived from the Mexican Government, and the Treaty of Guadalupe Hidalgo did not impair the rights of the inhabitants to those lands. Such rights were preserved and protected by the Treaty, which placed Mexican citizens on the same footing as citizens of the United States. By the Treaty the United States became vested with the title of only those lands in California which were not held in private ownership by a legal or equitable title, and at the same time it assumed the duty, imposed by the principles of general public law, of confirming the titles to lands which belonged, either equitably or legally, to private parties under rights derived from the Spanish or Mexican Governments.

As was said by this Court, in the case of *Langdeau vs. Hanes*, 21 Wall., 521, 527, referring to the cession by Virginia to the United States of its title to lands in the Northwest Territory :

" It was for the confirmation of existing possessions " and titles, that the deed of cession stipulated, not " the transfer of any new title. * * * In this re- " spect, she " (Virginia) " recognized the general rule " of public law, that by the cession of territory from

" one state to another, public property and sovereignty
" alone pass, and that private property is not affected.
" * * * The United States took, therefore, the
" territory ceded by Virginia bound by the established
" principles of public law, to respect and protect all
" private rights of property of the inhabitants of the
" country, and bound by express stipulation to confirm
" the possessions and titles of the French and Cana-
" dian inhabitants and other settlers * * * "

In the case of *San Francisco vs. Scott*, 111 U. S., 768, this Court declared that the decision of the State courts of California, upon the question

" whether after the conquest * * * and before
" the incorporation of the City of San Francisco, and
" before the adoption of the Constitution of the State
" of California, a person exercising the functions of
" an alcalde of the pueblo of San Francisco * * *
" could make a valid grant of pueblo lands,"

presents no Federal question. The Court saying:

" That is a question of general public law, as to
" which the decisions of the State Court are not re-
" viewable here. This has been many times decided."

The lands of plaintiff in error never were part of the public domain, and the United States never had any property rights in the waters of the Los Angeles River. The title to the land, and the rights of the parties in the waters of the river, were derived from Spain and Mexico, and not from the United States. So that the decisions cited by counsel for plaintiff in error to the effect that the question of what right or title passes under a patent of the United States granting its public lands is a Federal question, are not in point, for the reason that the patents issued by the United States to the

predecessors of the plaintiffs in error were not grants.

They were simply, "a record of the action of the "Government upon the title of the claimant as it "existed upon the acquisition of the country."

Beard vs. Federy, 3 Wall., 478, 491.

"In the legislation of Congress, a patent has a double "operation. It is a conveyance by the Government "when the Government has any interest to convey, but "where it is issued upon the confirmation of a claim of "a previously existing title it is documentary evidence, "having the dignity of a record, of the existence of "that title, or of such equities respecting the claim as "justify its recognition and confirmation. The in-"strument is not the less efficacious as evidence of "previously existing rights because it also embodies "words of release or transfer from the Government."

Langdeau vs. Hanes, 21 Wall., 521, 529.

"* * * The United States, in dealing with parties "claiming, under Mexican grants, lands within the "territory ceded by the Treaty of Mexico, never made "pretence that it was the owner of them. When, "therefore, guided by the action of the tribunals es-"tablished to pass upon the validity of these alleged "grants, the Government issued a patent, it was in the "nature of a quit-claim—an admission that the rightful "ownership had never been in the United States, but "had passed at the time of the cession to the claimant, "or to those under whom he claimed. This principle "has been more than once clearly announced in this "Court."

Adam vs. Norris, 103 U. S., 591, 593.

The fact that the United States in issuing patents confirming Mexican and Spanish titles of lands in the territory ceded by the Treaty of Guadalupe Hidalgo never pretended that it was the owner of such lands is also shown by the provision of the Act of Congress of March 3d, 1851, to the effect that patents issued to

claimants under that act shall be "conclusive between "the United States and the said claimants only, and "shall not affect the interests of third persons."

Seeing then, that the right or title asserted by the plaintiffs in error to the lands in controversy here was derived under Mexican and Spanish grants, and that, therefore, the decision of the State Courts upon the claims asserted by plaintiffs in error to the waters of the Los Angeles River flowing through those lands was not against "any title, right, privilege or immunity" claimed "under the Constitution or any treaty, or "statute of, or commission held, or authority exercised "under the United States," no Federal question was created by such decision.

It may be further observed that the Act of Congress of 1851, under which patents were issued to the predecessors of the plaintiffs in error, was not drawn in question or made the subject of dispute in the State Court, and that the decision of the State Court against the validity of the claim of the plaintiffs in error to the waters of the Los Angeles River flowing through their lands was not a decision against the validity of that act.

"The validity of a statute is not drawn in question "every time rights claimed under such statute are con-"troverted, nor is the validity of an authority every "time such authority is disputed."

Cook County vs. Calumet & C. Canal & D. Co., 138 U. S., 653.
Blackburn vs. Portland Gold Mining Co., 175 U. S., 571.
De Lamar's Nevada Gold Min. Co. vs. Nesbitt, 175 U. S., 523.

The same reasoning would apply to any contention by counsel for plaintiffs in error that the right or title

asserted by them in the lands soug ht to be condemned was within the protection of the treaty of Guadalupe Hidalgo, and that as the decision of the State Court was against their claim, a Federal question was created under the provisions of Section 709 of the Revised Statutes. For if it be conceded that the title of plaintiffs in error is protected by that treaty, still the suit does not arise thereunder because the controversy in the State Court did not involve the construction of the treaty but the validity of claims of title under Spanish and Mexican grants made prior to the treaty, and the decision of such controversy was not against the validity of the treaty.

The following cases are decisive upon this point :

New Orleans vs. De Armas, 9 Pet., 224.

U. S., vs. Arredondo, 6 Pet., 738.

Crystal Springs L. & W. Co. vs. City of Los Angeles, 82 Fed. Rep., 114, *affirmed in* 177 U. S., 169.

California Powder Works vs. Davis, 151 U. S., 389.

II.

The second question of a Federal character claimed by counsel to be presented by the record relates to an alleged deprivation of the property of plaintiffs in error without due process of law, in violation of the Fourteenth Amendment, by the method of procedure adopted by the State Court under its construction of the Statutes of the State, providing for the condemnation of private property for public use.

The manner in which this case was tried in the Court below was as follows: the Court sitting without a jury heard the evidence of the parties for the purpose of determining the issues, (1) whether the use to which the property was to be applied was one authorized by law, and the taking necessary; (2) whether the proposed plan was compatible with the greatest public good and the least private injury; (3) what was the nature and extent of the plaintiff's interest in the waters of the river.

At the close of the evidence bearing upon the three points mentioned, a jury was called, before whom the trial proceeded upon the question of damages. During the progress of the trial the Court made an oral announcement of its conclusions upon the issues submitted to its decision, but no formal findings were filed until after the jury rendered their verdict. The Court, however, in charging the jury instructed them as to the nature and extent of plaintiff's interest in the waters of the river. The defendants stipulated that the issue of the title to the property might be tried be-

fore the Judge, reserving, however, an objection to the jurisdiction of the Court to try any controverted question of title to the waters of the river in this action (Trans., fols. 462–3).

Counsel contend that a form of procedure for the condemnation of private property for public use, which permits the trial in the same action of a claim by plaintiff to an interest in the property sought to be condemned violates the Fourteenth Amendment, and that, in this particular case, the respective rights of the plaintiff and defendants in the lands sought to be condemned were not adjudicated until after the verdict fixing the amount of compensation had been entered, and that such a proceeding deprived the plaintiffs in error of their property without due process of law.

The Fourteenth Amendment in no way controls the power of the State to determine the form of procedure by which legal rights may be asserted, provided that the method adopted gives reasonable notice and affords a fair opportunity to be heard before issue is decided.

As was said by this Court, in the case of *Iowa Central Ry. Co. vs. Iowa*, 160 U. S., 389, 393:

" * * * It was obviously not a right, privilege, " or immunity of a citizen of the United States to have " a controversy in the State Court prosecuted or deter- " mined by one form of action instead of by another. " It is also equally evident, provided the form sanc- " tioned by the State law gives notice and affords an " opportunity to be heard, that the mere question of " whether it was by a motion or ordinary action in no " way rendered the proceedings not due process of law " within the constitutional meaning of those words. " Whether the Court of last resort of the State of Iowa " properly construed its own Constitution and laws in " determining that the summary process under those " laws was applicable to the matter which it adjudged, " was purely the decision of a question of State law, " binding upon this Court. Mere irregularities in the

" procedure, if any, were matters solely for the con-
" sideration of the judicial tribunal within the State
" empowered by the laws of the State to review and
" correct errors committed by its Courts. Such errors
" affect merely matters of State law and practice, in no
" way depending upon the Constitution of the United
" States, or upon any Act of Congress (Ludeling vs.
" Chaffe, 143 U. S., 305)."

So, also, in *Leeper vs. State of Texas*, 139 U. S., 462, this Court said (p. 468):

" Law in its regular course of administration through
" Courts of justice in due process, and when secured
" by the laws of the State the constitutional require-
" ment is satisfied; * * * due process is so secured
" by laws operating on all alike, and not subjecting the
" individual to the arbitrary exercise of the powers of
" government unrestrained by the established princi-
" ples of private right and distributive justice (Hurtado
" vs. California, 110 U. S., 516, 535)."

The Supreme Court of the State of California has decided that under the laws of the State it was competent for the Court to try and determine in a condemnation proceeding an adverse claim of the plaintiff to an interest in the property sought to be condemned. Counsel admit that this construction of the law of the State is conclusive upon this Court (Brief, pp. 85, 87), and that, therefore, the question to be considered is whether under the proceedings taken the plaintiffs in error were deprived of their property without due process of law (Brief, p. 89). Counsel contend that they were so deprived of their property because the written findings of fact on the issue of title to the waters of the Los Angeles River were not filed until the day after the verdict of the jury upon the question of damages was entered. But they do not point out what property it is that was thereby taken from

plaintiffs in error without due process of law, nor how the entry of the verdict of the jury, prior to the filing of the written findings deciding the question of water rights, had the effect of depriving plaintiffs in error of their property without due process of law. Indeed, the impossibility of making any such specifications is itself the basis of counsel's attack upon the constitutionality of the form of procedure complained of. They say :

"If this Court has the power to see to it that one's property shall not be taken for such use without just compensation, is it not absolutely essential to the exercise of that power that it should have the means of knowing whether it has been done or not? Can that jurisdiction be defeated by a method of procedure which precludes the ascertainment of the fact as to whether the constitution has been evaded or set at naught? Is not a statute, which baffles all inquiry into the question of whether one has been so deprived of his property, in violation of the Fourteenth Amendment?" (Brief, p. 99).

But if it be impossible to ascertain whether the method of procedure complained of in this case violates the Constitution of the United States or not, or if all inquiry into the question of whether the plaintiffs in error have been deprived of their property without due process of law is baffled, and this Court is precluded by the form of the procedure followed from ascertaining whether the Fourteenth Amendment has been violated, then there can be no federal question involved, for it is the settled construction of this Court that to bring any case within the reach of Section 709 Revised Statutes,

"it must appear upon the face of the Record of the "State Court, either by express terms, or by clear and "necessary intendment, that the question did actually "arise in the State Court, not that it might have arisen

" or have been applicable to the case ; and that the " question was actually decided, not that it might have " been decided by the State Court against the title, " right or privilege, or exemption set up by the party."

Ocean Insurance Company vs. William Polleys, 13 Pet., 157, 162.

" The Court must be able to see clearly from the " whole record that a certain provision of the Con- " stitution or Act of Congress was relied on by the " party who brings the writ of error, and *that the right* " *thus claimed by him was denied.*"

Bridge Proprietors vs. Hoboken Company, 1 Wall., 116, 143.

The jury, acting under instructions from the Court, found the value of the lands of the plaintiffs in error with a fee simple title subject to the ownership of the city of the exclusive right to the use of the surface and subterranean waters of the Los Angeles River flowing through said lands. The filing of the findings of the trial Court deciding that the city was the owner of such right, prior to the submission of the question of damages to the jury, could not have had the effect of increasing the amount of damages awarded by the jury under the instructions given them, and it follows that the postponement of the filing of those findings until after the verdict of the jury was rendered could not have deprived plaintiffs in error of any property, or denied them just compensation for any of the property taken.

It appears from the record (Trans., fol. 1115) that the objection made by plaintiffs in error to the order of procedure in their appeal to the State Supreme Court was in the following terms :

" If the court had any power to determine these " questions at all in this action, it was error to de-

" termine those issues before submitting the cause to " the jury."

We believe that the opinion of the learned Chief Justice of California conclusively answers this objection, and clearly shows the absence of any merit in the contention of counsel that the findings upon the question of title should have been filed before the verdict on the question of damages was entered.

" To speak of submitting this cause to the jury is " an inaccuracy which tends to confusion. By agree- " ment of the parties only one issue in the cause was " submitted to the jury, viz.: the question of damages. " All other issues were tried by the court, and it was " of no importance in what order they were decided, " except in so far as a determination of one point was " necessary as a basis for the determination of another. " Undoubtedly it was necessary that the jury should " be correctly instructed as to the quantity and extent " of the estate and interest of the defendants in the " land in order that they might correctly estimate its " value, and since from the nature of the rights in con- " troversy and the agreement of the parties that point " was to be decided by the Court, it was necessary " that the jury should be informed before retiring to " consider their verdict what the conclusion of the " court was, but that conclusion could be as well " stated before as after the filing of formal findings of " fact and conclusions of law. These were an essential " preliminary to the judgment but not to the instruc- " tions to the jury, and if the instructions actually " given were correct and full, the fact that findings had " not been previously filed is of no consequence " (Trans., fol. 1115).

III.

The third question of a Federal character, claimed by counsel to be presented by the record, relates to certain statutes of the State of California, which declare that the City of Los Angeles is vested with the paramount and absolute right to the surface and subterranean waters of the Los Angeles River, and which plaintiffs in error claim deprived them of their property, without due process of law in violation of the Fourteenth Amendment.

The statutes in question are referred to in folios 464 and 465 of the Transcript.

The following proceedings took place in the trial Court upon the introduction of these statutes in evidence:

"The defendants objected to the introduction of the "statutes upon the ground that they were incom- "petent, irrelevant and immaterial and unconstitu- "tional.

"The Court, to the said objection, said: I do not "see how the statutes are evidence at all. The court "takes judicial notice of the statutes. They may be "pertinent, perhaps, to show the city is the successor "of the ancient pueblo. I cannot see any other pur- "pose they are competent for.

"Mr. Chapman, of counsel for the defendants: In "so far as they are law, the court takes notice of them "without their being introduced. In so far as they "are anything else, they are simply nothing.

"The Court: Well, I admit them only for the pur- "pose of showing the succession of the present city of "Los Angeles to the former pueblo under the Spanish "and Mexican governments. To which ruling the de- "fendants duly excepted, upon the ground that they

" were not admissible for the purpose for which the " court admits them, and thereupon said statutes were " all introduced in evidence " (Tr., fol. 465).

The assignment of errors annexed to and returned with the transcript of the record, contains no assignment in reference to the introduction of these statutes in evidence, and this point is only brought to the attention of this court by the specifications in the brief of plaintiffs in error (Brief, p. 51), that,

" * * * the acts of the Legislature referred to, " as construed by said Supreme Court, were, and each " of them is, a law impairing the obligation contained " in the Spanish and Mexican grants, and the United " States Patents and deeds under which plaintiffs in " error claim title to the said property." And that " * * * the effect of said Acts of the Legisla- " ture, as construed by the Court in this cause, do de- " prive the plaintiffs in error of their property without " due process of law."

It would seem we are relieved from the necessity of considering the question of the admissibility of these statutes in evidence by the concession of counsel for plaintiffs in error, that " the introduction of the stat- " utes in evidence, therefore, was of no very great " consequence in the case, since they would have been " before the jury from this judicial notice " (Brief, p. 78), also from the fact that the trial Court limited the admission of the statutes as evidence to the sole purpose " of showing the succession of the present City " of Los Angeles to the former pueblo under the " Spanish and Mexican governments." The reason for this ruling of the trial Court will appear from an inspection of the titles of the statutes admitted in evidence, which show that they were all, with one exception (" An Act to promote irrigation in the County

of Los Angeles," approved March 10th, 1874, which expressly excluded the City of Los Angeles and the River of Los Angeles from its operation), acts for the incorporation of the City of Los Angeles, or acts amendatory thereof.

The first of this series of statutes is that entitled "An Act to incorporate the City of Los Angeles," passed April 4th, 1850, which contained the following provisions:

"SEC. 1. All that tract of land included within the "limits of the Pueblo de Los Angeles, as heretofore "known and acknowledged, shall henceforth be known "as the City of Los Angeles, and the said City is "hereby declared to be incorporated according to the "provisions of the Act entitled 'An Act to provide for "'the Incorporation of Cities,' approved March 18, "1850 * * *."

"SEC. 3. The Corporation created by this Act, shall "succeed to all the rights, claims and powers of the "Pueblo de Los Angeles in regard to property, and "shall be subject to all the liabilities incurred, and "obligations created, by the Ayuntamiento of said "Pueblo."

Counsel contend that these statutes, which were admitted in evidence, "only for the purpose of showing "the succession of the present City of Los Angeles to "the former pueblo under the Spanish and Mexican Governments," as construed by the Court below, deprived the plaintiffs in error of their property without due process of law, and that said statutes, as construed by the State Court, impaired the obligation of the contract contained in the Spanish and Mexican grants, and the United States Patents, under which plaintiffs in error claim their title (Brief, p. 51).

This contention rests wholly upon the construction placed by the State Courts upon the statutes complained of. Whether that construction was right or

wrong is not a question that will be reviewed by this Court. The construction by the State Court of a statute of the State is binding upon this Court. The only inquiry now to be made is, does it affirmatively appear from the record that the State Court so construed these statutes as to give them the effect of impairing the obligation of a contract, or of depriving plaintiffs in error of their property without due process of law. The objection of counsel for plaintiffs in error is directed against the portions of these statutes which purport to vest in the City of Los Angeles "the full, free and exclusive right to all the waters" flowing in the River Los Angeles above the southern boundary of the city. The record shows that the trial Court not only expressly limited the admission of these statutes in evidence to showing the *succession* of the present city to the former pueblo, but that the Court, disregarding the language of the statutes, held in its findings (Tr., fol. 57), and in its instructions to the jury (Tr., fol. 1009), that the city was the owner of the *paramount* right only to take from the Los Angeles river all of the waters of the river to the extent of its reasonable domestic and municipal needs, thus showing that the Court held that the right of the city to the waters of the Los Angeles river was based upon the Spanish and Mexican law and not upon any new, distinct, independent or other grant made in the statutes constituting the charters of the City of Los Angeles.

The opinion of the Supreme Court, with reference to the construction and effect of these statutes, is expressed in the following language:

"Instruction No. 33, requested by defendants, con-
"tains a sound proposition, viz.: that no Act of the

" Legislature of California can diminish or change the " rights of the defendants in these lands derived from " their predecessors, the Mexican and Spanish grantees. " But this was a question with which the jury had " nothing to do. The Court had determined the rights " of plaintiff as successor to the pueblo, and had in- " structed the jury what those rights were; whether its " instructions on this point were correct is a matter to " be considered when we come to those instructions, " but whether correct or incorrect, they necessarily " controlled the verdict of the jury to the exclusion of " all questions as to the effect of the Acts of the " Legislature " (Tr., fol. 1122).

" The defendandants hold their lands as successors " to several Spanish and Mexican grantees, under " patents from the United States based upon the " original grants. They claim that, even conceding " the rights of the pueblo, and the City's succession to " those rights (a concession which they make only for " the purposes of the argument on this point), they " are still, by virtue of their ownership of the lands in " question, entitled to the exercise of full riparian " rights, except so far, and so far only, as those rights " are impaired by the paramount rights of the pueblo, " as they existed before the change of flag, and with- " out any legislative addition thereto " (Tr., fol. 1122).

So that, neither in the trial Court nor in the Supreme Court of the State, was the validity of these statutes questioned on the ground of repugnance to the Federal Constitution. And both these Courts decided that these statutes neither granted to the city, nor took away from the plaintiffs in error, any rights or property.

For these reasons we submit that the record affirmatively shows that the Federal question suggested by counsel in relation to the construction or application of these statutes did not arise.

IV.

The fourth question set out by counsel for plaintiff in error, and claimed by them to give this Court jurisdiction, is, whether the proceedings in this case resulted in taking the property of plaintiffs in error without just compensation.

Counsel contend that such proceedings in the State Court did have the effect of taking the property of the plaintiffs in error without just compensation by reason of the construction placed by the trial Court in its instructions to the jury upon the statute of the State (C. C. P., Sec. 1249), which fixes the measure of compensation to be allowed in condemnation proceedings, and the date with respect to which such compensation shall be assessed.

That statute provides that,

" for the purpose of assessing compensation and dam-
" ages, the right thereto shall be deemed to have
" accrued at the date of the summons, and its actual
" value, at that date, shall be the measure of compen-
" sation " * * *

The Court instructed the jury that :

" * * * For the purpose of assessing this com-
" pensation and damages the right is deemed to have
" accrued at the date of the summons, which was June
" 27, 1893, and the actual value at that date is the
" measure of value for all property taken and the
" basis of damages for all property injuriously affected "
(Ins. No. 2, Tr., fol. 1009).

" In determining the actual value at the date of the
" summons you are not to take, as the measure of that
" value, what an owner could realize at a forced sale,
" but the price he could obtain after reasonable and
" ample time, such as would ordinarily be taken by an

" owner to make sale of like property; and in making " that estimate you should consider the use for which " the property is suitable, having regard to the existing " business or wants of the community, or such as " might have been reasonably expected in the immedi- " ate future. You will also consider the fitness of this " land for agriculture and its value for that purpose, " and for fruit or stock raising, for the timber growing " on it, as well as the water which may be in the soil, " not a part of the river, and from these and all other " uses to which the water may be put from which " profit may be derived, and from all the evidence on " the subject, you will determine its actual market " value at that date" (Ins. No. 25, Tr., fol. 1024).

" The market value of the land is not necessarily the " value of the land in its present or prospective use to " the owner; nor is it the value which it would be to " the City as a location for headworks; nor the sum " which the City might be compelled to give for it by " reason of the necessity it may be under to obtain it, " nor is it the sum that could be derived from the land " for any special purpose for which it may be suitable; " all these things, if shown by the evidence may be " considered as bearing on the question, but only so " far as it may appear that they affect the actual " market value at the date of the summons, and the " thing you are to determine is such actual market " value at the date stated" (Ins. No. 26, Tr., fol. 1024).

" Although you may believe from the evidence that, " by reason of things done, discovered or ascertained " since June 27, 1893, it now appears that the land " was then more valuable for any purpose or use than " it was then known to be, yet you cannot consider " such additional value, unless you believe also that " these things were sufficiently known or obvious in " June, 1893, to affect the market value at that time, " and did so affect it" (Ins. No. 27, Tr., fol. 1025).

" If the jury find that any of the underground waters " of the lands sought to be condemned are not a part " of the waters of the Los Angeles River, they can " consider that fact in fixing compensation only so far " as it tended, if at all, to affect the actual market " value of the land at the date of issuing the summons " disregarding any acts done upon the lands or infor- " mation acquired concerning said waters since said " date" (Ins. No. 28, Tr, fol. 1025).

" You are entitled to consider the evidence regard-

" ing the quantity of subterranean waters in the lands " in question, and their value, only in arriving at a just " determination of the market value of the lands " sought to be condemned on the 27th day of June, " 1893. Wherefore, if you believe that said waters " did not give said lands an additional market value at " that date, or that if an additional market value were " given, but the same did not equal the real value of " said waters, then you must place on said lands a " valuation equal only to the market value which said " waters gave to said lands, irrespective of the true " value of said waters.

" If, for instance, said lands could not have been " sold in the market on said date (the owners having " had abundant time to find a purchaser, such as would " generally be taken by an owner trying to sell like " property), for more than a certain sum, then you " must not find the value of said lands to be greater " than said sum, although, in fact, you may believe " that the waters in said lands made them worth more " than that sum " (Ins. No. 29, Tr., fol. 1025).

Counsel contend that the terms " actual value," " at " the date of summons," as employed in the statute of the State, mean the market value at that date, together with such additional value as discoveries subsequently made show that the property possessed at such date (Brief, p. 112), and that the statute, having been so construed by the State Court as to exclude from the consideration of the jury any elements of value that were not sufficiently known or obvious at the date of the summons as to affect the market value at that time, and did not then affect it, violates the rights of the plaintiffs in error under the Fourteenth Amendment to the Federal Constitution, by taking their property without just compensation, " for," counsel say, " when " the ' actual value ' is largely in excess of the market " value * * * then the market value * * * " is not just compensation " (Brief, p. 113).

That there is no such thing as " actual value " as

different from "market value," is obvious from the very meaning of the word value which is the *exchange* relation of commodities, that is, what a commodity will exchange for. See also on this point our main brief.

The burden of the argument of counsel upon this point is, that the market value of the property sought to be taken in a condemnation proceeding is not a proper measure of the amount to be paid therefor, because the "actual value" (by which we understand counsel to mean absolute or inherent value) may be much greater than the market value.

It is sufficient to say that this view has no support in the decisions of the courts of this country, State or Federal, and that the true rule laid down by them and declared by text writers is that the fair market value of the property is the measure of the compensation to be paid for it.

"The inquiry in such cases must be what is the "property worth in the market, viewed, not merely "with reference to the uses to which it is at the time "applied, but with reference to the uses to which it is "plainly adapted; that is to say, what is it worth from "its availability for valuable uses * * * its capa- "bility of being made thus available gives it a market "value which can be readily estimated."

Boom Co. vs. Patterson, 98 U. S., 403, 408.

THE RECORD FAILS TO SHOW THAT ANY FEDERAL QUESTION WAS ACTUALLY OR NECESSARILY DECIDED BY THE SUPREME COURT OF THE STATE OF CALIFORNIA IN THIS CASE.

Conceding that the inhibition or protection of the Constitution need not always have been specifically invoked or claimed in the Court below in order to give this Court jurisdiction, yet, as the authorities cited by counsel themselves show, it must always appear that the adjudication of a Federal question was

" necessarily involved in the disposition of the case by " the State Court," (*Kaukauna Water Power Co. vs. Green Bay and Mississippi Canal Co.*, 142 U. S., 254), and that, " from the facts stated, such question must " have arisen, and the judgment of the State Court " would not have been what it is if there had not been " a misconstruction of some act of Congress, etc., etc., " or decision against the validity of the right, title, " privilege, or exemption set up under it."
(*Harris vs. Dennie*, 3 Pet., 289).

" There must be something in the case before the " State Court which, at least, would call its attention " to the Federal question as one that was relied on by " the party. * * * It must appear from the record " that the right set up or claimed was denied by the " judgment or that such was its necessary effect in law."
(*Dewey vs. City of Des Moines*, 173 U. S., 193).

There is nothing in the record to show that the State Courts were led to suppose that any claim under the Constitution of the United States was made by plaintiffs in error, or that any ruling involved a decision against a right set up by them under that instrument.

In the case of *Sayward vs. Denny*, 158 U. S., 180,

this Court, in dismissing a writ of error, after stating the contention of the plaintiff in error that the effect of the judgment of the State Court was

" to deprive him of his property without due process of " law, or to deny him the equal protection of the laws, " and amounted to a decision adverse to the right, " privilege or immunity of plaintiff under the Con- " stitution of being protected from such deprivation or " denial," said :

" But it nowhere affirmatively appears from the " record that such right was set up or claimed in the " trial court when the demurrer to the complaint was " overruled, or evidence admitted or excluded, or in- " structions given or refused, or in the Supreme Court " in disposing of the rulings below." * * * " We " are not called on to revise these views of the prin- " ciples of general law considered applicable to the " case in hand. It is enough that there is nothing in " the record to indicate that the State Courts were led " to suppose that plaintiff in error claimed protection " under the Constitution of the United States from " the several rulings, or to suspect that each ruling as " made involved a decision against a right specially " set up under that instrument. And we may add that " the decisions of State tribunals in respect of matters " of general law cannot be reviewed on the theory that " the law of the land is violated unless their con- " clusions are absolutely free from error."

In their discussion of the proposition that the Constitution was sufficiently invoked in the Court below, counsel admit, that the opinion of the Supreme Court of the State of California shows that the main controversy between the parties concerned their rights under their respective titles in the lands sought to be condemned. In the language of Chief Justice BEATTY, quoted with approval by counsel :

" The particular points in controversy between the " parties are, *First*, as to the existence of a well-defined " subterranean stream, by which the waters or a large " portion of the waters, resulting from the rainfall " within the watershed of the San Fernando Valley,

" are carried off between the Cahuenga Range and the " Verdugo Hills; and *Second*, as to the rights of the " City of Los Angeles as the successor to the Mexican " pueblo, in the waters of the Los Angeles River. The " claim of the plaintiff is that the City has certain ex- " tensive rights in the stream, over and above those of " the ordinary riparian owners, and that the stream " itself consists, not only of the visible surface flow of " the river, but of the large subterranean flow, slowly " passing through the boulders, gravel and sand, under " and adjacent to, the river.

" Both of these claims are disputed by the defend- " ants, and out of this controversy arise most of the " points to be considered in disposing of the appeal " (Trans., fol. 1113).

We submit, that this statement of the controversy, which counsel adopt, shows nothing more than a suit involving conflicting claims to real property under a title derived from Mexico, and counsel are mistaken in claiming that " plaintiffs in error did, by their answer, " distinctly plead a title derived from the United States " Government " (Brief, p. 78). The answer and amended answer (Trans., fols. 35–39), show that plaintiffs in error pleaded a title based upon Mexican grants. And as to controversies affecting such a title, the opinion of this Court, in the case of *Phillips vs. Mound City Association*, 124 U. S., 605, 609, is in point.

" Both parties claim under the Mexican grants " confirmed by the United States. The patents vested " the legal title in the grantees. By an express " provision of the Act of March 3, 1851 (Sec. 15), " they are conclusive 'between the United States and " 'such claimants only,' and do 'not affect the " 'interests of third parties.' * * * Article VIII. " of the treaty protected all existing property rights " within the limits of the ceded territory, but it " neither created the rights nor defined them. Their " existence was not made to depend on the Constitution, " laws or treaties of the United States. There was " nothing done but to provide that if they did in fact " exist under Mexican law, or by reason of the action

" of the Mexican authorities, they should be protected. " Neither was any provision made as to the way of " determining their existence. All that was left by " implication to the ordinary judicial tribunals. Any " Court, whether state or national, having jurisdiction " of the parties and of the subject matter of the " action, was free to act in the premises."

So that the decision by the State Court of the controversy as to the title to the surface and subterranean waters of the Los Angeles River was the decision of a question of local law and did not involve any Federal question.

The objection of the plaintiffs in error to the trial in the condemnation proceedings of the city's claim of title to the waters of the Los Angeles River flowing through their lands was made upon the ground that, under the statutes of the State, the Court had no jurisdiction to try a question of title to the waters of the river in such a proceeding.

This objection presented only a question of practice under the State laws. It did not create an issue as to the validity of a State statute under the Constitution of the United States, or call the attention of the Court to any right set up, or claimed thereunder, by plaintiffs in error, and, therefore, the State Court cannot be held to have disposed of such a Federal question by its decision.

" A definite issue as to the validity of the statute or " the possession of the right must be distinctly de- " ducible from the record before the State Court can

" be held to have disposed of such a Federal question " by its decision."

Powell vs. Brunswick Co., 150 U. S., 433, 440.

We also submit, that the State Court disposed of no Federal question in admitting in evidence statutes of the State showing the succession of the present City of Los Angeles to the former pueblo, over the objection of counsel for plaintiffs in error that they were " in- " competent, irrelevant, immaterial and unconstitu- " tional." The last-named objection is presumed to refer to the Constitution of the State.

In *Miller vs. Cornwall R. R. Co.*, 168 U. S., 131, 134, this Court, speaking by Chief-Justice FULLER said:

" We have no jurisdiction on a writ of error to a " State Court to declare a State law void on account of " its collision with a State Constitution, and it was " long ago held that where it was objected in the State " Courts that an Act of the State was ' unconstitutional " ' and void,' the objection was properly construed in " those Courts as raising the question whether the " State Legislature had the power under the State " Constitution to pass the Act, and not as having ref- " erence to any repugnance to the Constitution of the " United States. *Porter vs. Foley*, 65 U. S., 24, How., " 415."

See, also,

Kipley vs. State of Illinois, 170 U. S., 182.

In so far as the contention of counsel, that Section 1249 of the Code of Civil Procedure of California, as construed by the State Courts, violates the Fourteenth Amendment to the Constitution of the United States, may be understood as being directed against the provisions of the section fixing the date of the summons as the time with reference to which compensation shall be assessed, we need only point out that the trial Court instructed the jury upon this point, as expressly requested by counsel for plaintiffs in error (Tr., fol. 1040), and that, in their application for a new trial, they made no specification of error based upon such instructions.

Furthermore, the opinion of Chief Justice BEATTY shows that while the plaintiffs in error, as appellants in the State Supreme Court, argued before that Court that the charge that the value of the property at the date of the summons must control, was unconstitutional, yet that Court refused to consider or decide the question, saying :

" * * * The hardships of this rule, when applied " to a case in which so long a time elapses between the " issuance of summons and the trial of the cause, as " happened in this instance, are strongly stated by " counsel, and their argument against the constitution- " ality of this feature of the statute would not be un- " deserving of consideration if they were in a position " to urge it. But the fact is this portion of the charge " was given in form and in substance as they requested " it in the instructions proposed by themselves, and " they cannot, therefore, claim that the Court erred in " allowing it " (Tr., fol. 1124).

Moreover, the question suggested by such argument of plaintiffs in error against the constitutionality of this feature of the statute was one arising under the Constitution of the State *(Kipley vs. State of Illinois, supra)*,

and, even if entertained and expressly decided against the plaintiffs in error by the State Court, would not have conferred jurisdiction upon this Court.

Therefore, it cannot be said that a question was raised in the State Courts by plaintiffs in error as to the validity, under the Federal Constitution, of the statutory provision above mentioned, or that such question was decided.

In conclusion, we submit, that it is manifest, from the record, that the plaintiffs in error did not intend, by any pleading, objection, or argument, in the State Courts, to raise any question of a Federal nature, and that there is nothing in the record to show that the State Courts were led to suppose that any claim, under the Constitution of the United States, was made by plaintiffs in error, or that any ruling made by those Courts involved a decision against a right set up under that instrument.

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